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No. 08-

IN THE

Supreme Court of the United States

BURL CAIN, Warden, Louisiana State Penitentiary,

Petitioner,

v.

SALVADOR PEREZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the respondent's claim of insufficient evidence to negate his insanity defense is cognizable on federal habeas?

2. Whether the Fifth Circuit misapplied Jackson v. Virginia when it analyzed whether the evidence was sufficient to negate the defendant's insanity defense, where sanity is not an element to be proved by the state?

3. Whether the Fifth Circuit erred in finding that the state courts' ruling that the evidence was sufficient to convict Perez of first-degree murder was an unreasonable application of Jackson v. Virginia because a jury could reasonably have rejected the evidence of insanity?

PARTIES TO THE PROCEEDING

Petitioner (defendant and appellant below):

BURL CAIN, Warden of Louisiana State Penitentiary

Represented by Donna Rau Andrieu, Orleans Parish District Attorney's Office, 1340 Poydras Street, Suite 700, New Orleans, Louisiana 70112

Respondent (plaintiff and appellee below):

SALVADOR PEREZ

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and

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Petitioner Burl Cain, Warden of Louisiana State Penitentiary, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of United States Court of Appeals for the Fifth Circuit (Appendix A) is reported at 529 F. 3d 588, C.A. 5 (La.), May 29, 2008 (NO. 08-30082). The opinion of the United States District Court for the Eastern District of Louisiana (Appendix B) is available as a slip copy at Perez v. Cain, No. 04-1905, 2008 WL 108661 (C.A. 5 (E.D. La.), January 8, 2008. The opinion of the Louisiana Fourth Circuit Court of Appeal is reported at 745 So. 2d 166 (La. App. 4 Cir. 1999) (Appendix C). The writ denied action of the Louisiana Supreme Court is reported at 768 So. 2d 32 (La. 9/22/00)(NO. 1999-K-3327).

STATEMENT OF JURISDICTION

The opinion of United States Court of Appeals for the Fifth Circuit sought to be reviewed was entered on May 29, 2008. The United States District Court for the Eastern District of Louisiana had jurisdiction pursuant to 28 U.S.C. §§ 2241 and 2254. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment of the United States Constitution provides, in relevant part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law..."

28 U.S.C § 2254. State custody; remedies in Federal Courts

—(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that–

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the

rights of the applicant.

* * *

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Petitioner appeals the granting of the petition filed by Respondent under 28 U.S.C. § 2254 for a writ of habeas corpus.

On September 12, 1996, Respondent, Salvador Perez ("Perez"), was charged by grand jury indictment with the July 17, 1996 first-degree murder of New Orleans Police Officer Chris

McCormick, a violation of Louisiana Revised Statute 14:30. On October 8, 1996, upon motion of Perez's trial counsel, Perez's competency to proceed to trial was evaluated by two court appointed experts. The experts both found Perez competent to proceed to trial and also concluded that Perez was not suffering from any mental illnesses. On January 30, 1997, the court ruled that Perez was competent to proceed. On April 4, 1997, Perez withdrew his former plea of not guilty and entered a plea of not guilty by reason of insanity.

A month later, or nine months after Officer McCormick was killed, an expert in clinical psychology interviewed Perez and determined that Perez was suffering from a severe persecutory delusional disorder. A month later, one of the experts who had found that Perez was not suffering from any mental illnesses, examined Perez and found that he was "sounding psychotic." Thereafter, four more experts, including one who had examined Perez in October of 1996 and found that he was not suffering from a mental illness, examined Perez and found that he was suffering from a mental illness. These evaluations took place between December of 1997 and March of 1998.

In August of 1997, Perez was determined to be a danger to himself or others and was transferred to

the Feliciana Forensic Facility ("FFF"). Upon admission, he was found to be incompetent to proceed to trial. Perez's treating physician testified that Perez had a disorganized thought process and a difficulty communicating that was not uncommon with someone suffering from mental illness. He testified that Perz had hallucinations and delusions. He testified on cross-examination that it was possible that Perez's sixteen month confinement had contributed to his present condition. Perez was treated with the anti-psychotic medication Haldol while at FFF, and his condition improved.

At the outset of Perez's three-day trial in March of 1998, Perez's attorney admitted that his client killed Officer McCormick. He claimed a defense of insanity. The State put on lay witnesses who established Perez's behavior on the day of the homicide. Testimony adduced during the State's case-in-chief established that earlier in the day, Perez and his son were spotted near a barn at the New Orleans Fair Grounds, and that Perez was armed. When a security officer approached, Perez drew a handgun and pulled his son in front of him. The security officer retreated and called the police.

Later in the day, Arden Taylor, a New Orleans Police Lieutenant, arrived at the Fair Grounds and learned that a twelve-year-old boy had

been abandoned near the racetrack and was in the security office. Lieutenant Taylor learned that the boy was the same one whose father had confronted the security officer earlier that day. The boy, Salvador Perez, Jr., informed the officer that he and his father had come from Texas in a van that was parked nearby. The boy told him that his father had "ripped off" some drug dealers and that his father believed that gangs were following him from Texas. Lieutenant Taylor asked if there were any drugs in the van, and the boy answered negatively. He told the officers that his father had already delivered them. No drugs were found in the van.

Debbie Mastio testified that on July 17, 1996 she was living in the top half of a duplex in a house adjacent to the New Orleans Fair Grounds. She arrived home at 10:30 p.m. and noticed that her hot water was not running. Mastio used an outdoor set of stairs to check on her hot water heater. She went halfway down the stairs and saw Perez, who suddenly pulled his hands up and pointed a long, cylindrical, shiny metallic object at her. Mastio ran back inside and a friend who was visiting her went outside, only to return a few seconds later. He also saw Perez. Mastio called the police. Officer McCormick and his partner arrived. They walked through her apartment, to the back door, and down the stairs. When Officer McCormick reached the

bottom of the stairs, Perez shot him. The officer's partner radioed for help, and, after a shoot-out, Perez was apprehended under a neighboring house.

Detective Joseph Catalanotto, one of the investigating officers, testified that he spoke to Perez's wife over the telephone shortly after the homicide. When the detective asked Mrs. Perez if her husband had any psychological problems, she answered in the negative.

Finally, the State presented evidence that the hospital records of Charity Hospital in New Orleans, where Perez was treated on the night of the homicide, showed that he was alert and oriented. The doctors who treated him immediately after the homicide did not detect any psychological problem, nor did they see fit to refer him for psychiatric evaluation.

Perez put on testimony from seven experts, six of whom testified that Perez suffered from a mental disease. Among those experts were the two doctors who had evaluated Perez in October of 1996. They testified that, after having spoken again to Perez, as well as Perez's wife and son on February 3, 1998, they had changed their minds on the issue of Perez's sanity. The State called into question the adequacy of the factual assumptions on which the

expert opinions were based. Specifically, the State established that the psychiatric and psychological experts had not evaluated Perez until several months after Officer McCormick's death. In fact, some of the doctors did not evaluate Perez until seventeen months after the homicide. The State also elicited testimony that the opinions were based on information provided by Perez or his wife, who had told the experts that her husband had been acting strangely for the two weeks leading up to the homicide.

Mrs. Perez testified that, for two weeks preceding the murder, her husband had been acting strangely. However, on cross-examination, Mrs. Perez testified that she had told one of the experts in April of 1997 that her husband had not been acting strangely before the murder. Another expert testified that Mrs. Perez told him that her husband had no history of psychiatric problems or treatment. On cross-examination, one of the experts testified that Perez's period of pre-trial incarceration could have contributed to his condition when the expert saw him in December of 1997. Finally, referring to the incident at the Fair Grounds, another expert testified that he could imagine that Perez simply shot Officer McCormick because he did not want to go to jail.

Perez was found guilty as charged, and on the recommendation of the jury, he was sentenced to life imprisonment without benefit of parole. He exercised his right to appeal in the state courts, where he argued that the evidence was insufficient to convict him because he had proved insanity. Perez raised a related claim in a petition filed in the United States District Court for the Eastern District of Louisiana under 28 U.S.C. § 2254, where he argued that his claim in the state courts resulted in a decision that was contrary to, or involved an unreasonable application of Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed. 2d 560 (1979). The district court granted habeas relief on several claims, including the claim raised under Jackson v. Virginia. Burl Cain, Warden of Louisiana State Penitentiary, appealed, and the United States Fifth Circuit affirmed the federal district court's judgment based on the claim raised under Jackson v. Virginia.

REASONS FOR GRANTING CERTIORARI

1. THE RESPONDENT'S CLAIM OF INSUFFICIENT EVIDENCE TO NEGATE HIS INSANITY DEFENSE IS NOT COGNIZABLE ON FEDERAL HABEAS REVIEW.

The Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA"), in 28 U.S.C. §

2254(a), limits federal habeas corpus relief to a defendant "held in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). In its Order and Reasons to Perez's application for federal habeas corpus review, the district court addressed the claim that there was insufficient evidence to rebut Perez's affirmative defense of legal insanity. Exh. B, pp. 1, 14. The district court and, on appeal, the United States Court of Appeals for the Fifth Circuit, determined Perez's claim was cognizable under the AEDPA, holding that constitutional due process rights mandated that the claim be analyzed under the sufficiency of the evidence standard set forth by this Court in Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed. 2d 560 (1979). Exh. B, p. 16; Exh. A, p. 12. However, under Louisiana law, sanity is not an element to be proved by the State. Therefore, no due process considerations are invoked, and the courts' reliance on Jackson v. Virginia is misplaced.[1]

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[1] In fact, the courts below cited Donahue v. Cain, 231 F.3d 1000 (5th Cir. 2000) as authority for their contention that the Jackson standard applied to the sufficiency of the evidence for proving insanity. However, Donahue v. Cain does not support the courts' contention that due process rights, and thus Jackson, apply in this case as Donahue addresses the due process considerations for sufficiency of the evidence for elements that the State must prove at a criminal trial.

In Louisiana, the defendant bears the burden of overcoming a presumption of sanity and proving he was insane during the commission of an offense by a preponderance of the evidence. La. Rev. Stat. 15:432; Louisiana Code of Criminal Procedure Article 652. This Court has established that there is no federal constitutional requirement that the prosecution in a criminal case disprove an affirmative defense, and due process rights are not violated on claims where a defendant is required to carry the burden of persuasion. Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). Accordingly, there is no federal question in this claim cognizable on federal habeas review.

The Due Process Clause of the Fourteenth Amendment requires the government to prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant was charged. Jackson v. Virginia, supra. Where a petitioner challenges his conviction for insufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 319.

In Louisiana, a legal presumption exists that a defendant is sane at the time of the commission of an offense. La. Rev. Stat. 15:432; State v. Williams, 346 So.2d 181 (La.1977). Thus, where a defendant pleads not guilty by reason of insanity, it is the defendant's burden to prove by a preponderance of the evidence that he or she was incapable of distinguishing right from wrong at the time of the commission of the offense. La. Rev. Stat. 14:14; State v. Williams, supra. Insanity is an affirmative defense, and sanity itself is not an element that the State must prove in order to support the imposition of criminal punishment under state law. Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359.[2]

Accordingly, as insanity is an affirmative defense and is not an element that needs to be proven by the state, due process rights are not at issue in claims of sufficiency of the evidence in an insanity defense. Patterson, supra; *See also* Alien v.

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[2] The Fifth Circuit noted as much: "This standard is applied with 'reference to the substantive elements of the criminal offense as defined by state law.'" Exh. A, p. 13. Nevertheless, the appellate court went on to apply the standard to the issue in this case, which does not involve a question of whether the substantive elements of Louisiana's first degree murder statute were met, but whether Perez proved his affirmative defense. Ultimately the court found that the evidence was insufficient for the jury to find that Perez failed to show he was insane.

Redmen, 858 F.2d 1194, 1198, 1200 (6th Cir. 1988)(habeas review of sanity finding not permitted because Michigan law required the defendant to bear the burden of proving the affirmative defense of insanity); Johnigan v. Elo, 207 F. Supp. 2d 599, 612 (E.D. Mich. 2002)("whether the defendant is mentally ill or not mentally ill is not an element of any criminal offense. Therefore, a challenge to the evidence pertaining to this matter is not reviewable in habeas corpus").

This rule of law was applied by this Court in Patterson v. New York, supra:

> This affirmative defense...does not serve to negative any facts of the crime which the State is to prove in order to convict of murder. It constitutes a separate issue on which the defendant is required to carry the burden of persuasion; and unless we are to overturn Leland [Leland v. Oregon, 343 U.S. 790, 798, 72 S. Ct. 1002, 1007, 96 L. Ed. 1302 (1952)] and Rivera [Rivera v. Delaware, 429 U.S. 877, 97 S. Ct. 266, 50 L. Ed. 2d 160 (1976)], New York has not violated the Due Process Clause, and Patterson's conviction must be sustained.

Patterson, 432 U.S. at 206-207. This Court, then, has never recognized a federal constitutional right to

present a sanity defense. Medina v. California, 505 U.S. 437, 449, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992).

Accordingly, both the District Court for the Eastern District of Louisiana and the United States Court of Appeals for the Fifth Circuit erred when they determined that the Due Process Clause of the United States Constitution applied in this case. The Due Process Clause of the Fourteenth Amendment only requires the government to prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant was charged. Louisiana places the burden of overcoming a presumption of sanity and of proving insanity on a defendant. An insanity defense, then, is an affirmative defense where the burden of proof is placed on the defendant and not the State. For these reasons, federal habeas review of the sanity finding of a Louisiana state court in a criminal case is barred.

In fact, for the federal habeas petitioner in this case to be afforded relief on this claim this Court would have to create a "new rule," barred under Teague v. Lane, 489 U.S. 288, 301, 109 S.Ct. 1060, 103 L.Ed. 2d 334 (1989), that insanity cannot be deemed an affirmative defense, or that the prosecution must always disprove affirmative defenses beyond a reasonable doubt. Such a rule was

neither dictated nor compelled by this Court at the time that Perez's conviction became final. In fact, this Court in Patterson specifically refused to establish such a rule. 432 U.S. at 210. ("We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused.") Thus, Perez's claim that his due process rights were violated because there was insufficient evidence to negate his insanity defense was barred from consideration on federal habeas review. Accordingly, the petition in this case should be granted.

2. THE FIFTH CIRCUIT MISAPPLIED JACKSON V. VIRGINIA WHEN IT ANALYZED WHETHER THE EVIDENCE WAS SUFFICIENT TO NEGATE THE DEFENDANT'S INSANITY DEFENSE, WHERE SANITY IS NOT AN ELEMENT TO BE PROVED BY THE STATE.

Assuming *arguendo* that Perez's challenge to the sufficiency of the evidence is cognizable under 28 U.S.C. § 2254, the lower courts in this case, nevertheless, misapplied Jackson v. Virginia. The Fifth Circuit, in applying the Jackson standard to Perez's "sufficiency of the evidence" claim, analyzed whether the evidence was insufficient for the jury to find that Perez failed to show he was insane. In so

doing, the Fifth Circuit treated sanity as though it is an element of the crime, violating Louisiana substantive state law and tacitly establishing a rule of law that impermissibly exceeds a defendant's right to due process.

Specifically, in reviewing Perez's sufficiency of the evidence claim, the Fifth Circuit pronounced what it contended to be the applicable standard in this case:

> In light of Louisiana law on the issue of insanity, the question under the Jackson sufficiency standard is whether, viewing the evidence in the light most favorable to the state, any rational trier of fact could have found beyond a reasonable doubt that Perez did not prove by a preponderance of the evidence that he was insane at the time of the offense.

Exh. A, pp. 13-14.

Under Louisiana law, a legal presumption exists that a defendant is sane at the time of the offense. La. Rev. Stat. 15:432. To rebut the presumption of sanity and avoid criminal responsibility, the defendant has the burden of proving the affirmative defense of insanity by a preponderance of the evidence. La. C.Cr. P. Art. 652.

For that reason, the federal district court could not overturn the jury's conclusion on habeas review unless it found as a matter of law that the jury could not reasonably reject the evidence of insanity. Instead, the courts in this case, even if Perez's claim is cognizable, misapplied Jackson.

The Fifth Circuit's error is seemingly rooted in its equating the standard pronounced and applied in the Fifth Circuit's decision in Donahue v. Cain, supra, with the standard to be applied in this case. However, the equating of the two standards could not be more inappropriate. While Donahue involved an analysis under Jackson of whether the evidence was sufficient to prove the elements of the crime, this case involves the "sufficiency of the evidence" of an affirmative defense.

In Donahue, the federal habeas petitioner was convicted by a Louisiana state court of attempted first-degree murder of a peace officer, in violation of La. Rev. Stat. Ann. §§ 14:27 and 14:30 (A)(2).[3] On appeal, and later in his federal habeas petition, Donahue contended that the evidence was

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[3] Under La. Rev. Stat. 14:30(A)(2), in pertinent part, first degree murder "is the killing of a human being. . . [w]hen the offender has a specific intent to kill or inflict great bodily harm upon a . . . peace officer. . . engaged in the performance of his lawful duties, or when the specific intent to kill or inflict great bodily harm is directly related to the victim's status of a . . . peace officer."

insufficient to support his conviction because the state had not proved an element, specifically that Donahue knew the victim was a peace officer. The federal courts determined that the question under Jackson was "whether the evidence adduced at trial would lead a rational trier of fact to conclude beyond a reasonable doubt that Donahue knew or reasonably should have known that [the victim] was a peace officer at [the time of the offense]." Donahue v. Cain, 231 F. 3d at 1004.

In this case, the federal district court specifically cited Donahue in establishing the standard of review in this case:

> Applying the Jackson standard to the insanity defense under Louisiana law, the inquiry for a reviewing court is whether any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could conclude beyond a reasonable doubt that the defendant failed to prove by a preponderance of the evidence that he was insane at the time of the offense.

Exh. B, pp. 52-53. Establishing the root of its reasoning in this case, the federal district court footnoted the above quotation to Donahue v. Cain, supra.

Whether there was sufficient evidence to prove any of the elements of first-degree murder has never been challenged in this case, and that issue was not raised as a claim in Perez's habeas petition. The Fifth Circuit's equating a standard of review in a case involving the sufficiency of the evidence of an element the state is required to prove, with a case involving a determination of whether the defendant has met his burden of proving an affirmative defense, has established a rule of law that violates state substantive law and impermissibly exceeds a criminal defendant's right to due process. As such, the petition should be granted.

3. THE FIFTH CIRCUIT ERRED IN FINDING THAT THE STATE COURTS' RULING THAT THE EVIDENCE WAS SUFFICIENT TO CONVICT PEREZ OF FIRST-DEGREE MURDER WAS AN UNREASONABLE APPLICATION OF JACKSON V. VIRGINIA BECAUSE A JURY COULD REASONABLY HAVE REJECTED THE EVIDENCE OF INSANITY.

The Fifth Circuit erred in finding that the state courts' ruling that the evidence was sufficient to convict Perez of first-degree murder was an unreasonable application of Jackson v. Virginia because a jury could reasonably have rejected the evidence of insanity. Based on the state's evidence

that established Perez's behavior at the time of the homicide and immediately thereafter, the state's impeachment of the experts, inconsistencies in material statements made by the defendant's wife, and in light of the full play given to the trier of fact to resolve conflicts in testimony and to make credibility determinations, it cannot be said that a jury could not have reasonably rejected the evidence of insanity. In fact, the opinion in this case violates the presumption of good sense and fair-mindedness accorded juries in criminal cases which is the mainstay of Jackson.

First, the state presented evidence of behavior exhibiting Perez's mental state at the time of the homicide and immediately thereafter. In fact, the Fifth Circuit made an error of fact in finding that the state put on no lay testimony on the issue of Perez's mental state. See, Exh. A, pp. 7, 16, 19. ("[The state] did not offer any lay testimony on the issue [of Perez's mental state].")("[T]he state did not present any direct evidence of Perez's mental condition...")("The jury was given nothing from which it could draw an inference about Perez's mental state on the night of the offense..."). The state's evidence of Perez's behavior and the Charity Hospital medical records evidenced his mental state.

Through lay testimony, the state established that Perez had pulled a gun on a security officer at

the New Orleans Fair Grounds earlier in the day. Based on the evidence of Perez's behavior at the Fair Grounds, the jury could have reasonably inferred that Perez shot Officer McCormick to avoid arrest for his earlier crime.

The state also offered lay testimony that Perez ran and secreted himself from police after he shot Officer McCormick. A jury could reasonably have found that this behavior evidenced Perez's knowledge of the difference between right and wrong.

The state also published a police report to the jury that demonstrated that Perez was involved in narcotics. Specifically, the report evidenced that when Salvador Perez, Jr. was questioned by Lieutenant Taylor as to whether there were any drugs in his father's car, the boy answered in the negative, and he told the lieutenant that his father had already delivered the drugs. In fact, ignoring Salvador, Jr.'s statement to Lieutenant Taylor, the Fifth Circuit made an error of fact in finding that there was no evidence that Perez was involved in narcotics.

Finally, Perez's medical records from Charity Hospital, where Perez presented and was treated after his shootout with the police, were published to the jury. Those records reflect that immediately

after the shooting, Perez was alert and oriented. The medical records do not reflect that Perez's treating physicians found any indication of a mental state consistent with insanity, and they do not evidence that the Charity physicians referred him to a psychiatric unit. While the Fifth Circuit, in its own appreciation of the facts of the case, believed that the Charity records "could not be considered in a vacuum," the jurors were free to exercise their discretion as fact-finders and could reasonably find that the records were material evidence of Perez's mental state.

Also, the state undermined the opinions of the experts based on the substantial delay between the shooting and the experts' examinations. In fact, the Fifth Circuit made an unsubstantiated assumption of fact when it determined that the jurors disregarded the experts' opinions. See, Exh. A, p. 21. ("We further agree with the district court's conclusion that impugning the veracity of Perez's wife and son was insufficient to permit the jury to ignore the experts' opinion..."). The record does not support that the jurors ignored the experts. Rather, the record supports that the jurors considered all of the evidence and, finding a rational basis to reject the evidence of insanity, found Perez guilty of first-degree murder.

On cross-examination, the experts testified that they based their opinions on information provided by Perez, his wife, and son, witnesses a jury could find were biased, particularly in light of earlier inconsistent statements of Mrs. Perez and her son. The experts also testified that they did not objectively verify any of the information provided by Perez, his wife, and son. The failure of the experts to verify this information called into question the reliability of the opinions. Finally, the jury was made aware that the experts' evaluations occurred between nine and seventeen months after Officer McCormick's shooting. This delay provided the jury with a rational basis to reject Perez's claim that he was insane at the time he shot Officer McCormick.

The jury was aware that two of the experts had examined Perez shortly after the shooting and had found that he was sane. While the Fifth Circuit found significance in the offered reasons for the experts' earlier finding, the conflict was for the jury to resolve, and the Fifth Circuit's second-guessing the jury is barred under Jackson. Relatedly, while the Fifth Circuit found significance in Perez's response to his Haldol treatment that began over thirteen months after the shooting, a jury could reasonably have determined that Perez's response supported the state's argument that Perez's condition had deteriorated during his incarceration.

In fact, the jury was aware that Perez's treating physician found deterioration a possibility.

The state also cross-examined Mrs. Perez. On direct examination, she testified that her husband had been acting strangely for two weeks before the homicide. However, on cross-examination she testified that she had told one expert in April 1997 that her husband had not been acting strangely before the homicide. Also, the jury heard that when Mrs. Perez was asked by Detective Catalanotto in July of 1996 whether her husband had any psychological problems, she answered in the negative. Finally, one of the experts also testified on cross-examination that Mrs. Perez had told him that her husband had no history of psychiatric problems or treatment. The impeachment of Mrs. Perez called into question her veracity as a witness, and also called into question the conclusions of the experts who relied on information provided by her in forming their opinions.

The Fifth Circuit discounted the effect of cross-examination in this case. However, this Court has long held that cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested. Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). In fact, over a decade after this Court's opinion in Davis, this Court hailed cross-examination

as "a tool used to flesh out the truth, not an empty procedure." Kentucky v. Stincer, 482 U.S. 730, 737, 107 S.Ct. 2658, 96 L. Ed. 2d 631 (1987). Cross-examination in this case provided the jury with a rational basis to reject Perez's claim that he was insane at the time he shot Officer McCormick, and it should not have been discounted.

The Fifth Circuit also criticized the state appellate court for failing to consider the experts' qualifications and disinterested status "in its calculus of what a rational jury could have found when considering the expert opinions." Exh. A, p. 17. However, first of all, Jackson does not direct reviewing courts to find what a rational jury "could have found." Under Jackson, the question "is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements beyond a reasonable doubt." Jackson, 443 U.S. at 319. The Fifth Circuit's criticism in this regard is also misplaced in light of this Court's long-standing holding in Head v. Hargrave, 105 U.S. 45, 26 L. Ed. 1028 (1881), where this Court announced that "questions of credibility and expert opinion testimony are for the trier of facts, and such testimony is ordinarily not conclusive even where it is uncontradicted." Head v. Hargrave, 105 U.S. at 49.

The Fifth Circuit's opinion in this case offends the presumption of good sense and fair-mindedness accorded a criminal jury. Further, the opinion is based on several errors of fact as well as flawed reasoning, including suggestions of what the jury "could have found." It is also based on unsubstantiated assumptions such as an assumption that the jury arbitrarily ignored the experts.

Finally, in its opinion, the Fifth Circuit reexamined the facts establishing Perez's guilt and weighed the facts as it appreciated them. See, Exh. A, p. 24. ("It is objectively unreasonable to conclude that a rational family man with no violent criminal history would suddenly flee with one son, leave his remaining family behind, drive to an unfamiliar city in an unfamiliar state, hide in someone's backyard shed, and then shoot a police officer.")

However, this Court has held that "[f]ederal courts are not forums in which to relitigate state trials." Barefoot v. Estelle, 463 U.S. 880, 887, 103 S. Ct. 3383, 3391, 77 L. Ed. 2d 1090 (1983). In Wainwright v. Sykes, this Court recognized that the guilt or innocence determination in state criminal trials is "a decisive and portentous event." Wainwright v. Sykes, 433 U.S. 72, 90, 97 S. Ct. 2497, 2508, 53 L. Ed. 2d 594 (1977). Relatedly, this Court in Wainwright recognized that "[s]ociety's resources have been concentrated at that time and place in

order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens." Id.

This Court has further held that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution, not to correct errors of fact. See, e.g. Moore v. Dempsey, 261 U.S. 86, 87-88, 43 S. Ct. 265, 265, 67 L. Ed. 543 (1923). (Holmes, J.) ("[W]hat we have to deal with [on habeas review] is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved"; Hyde v. Shine, 199 U.S. 62, 84, 25 S. Ct. 760, 764, 50 L. Ed. 90 (1905)("[I]t is well settled that upon *habeas corpus* the court will not weigh the evidence.") (emphasis in original); Ex parte Terry, 128 U.S. 289, 305, 9 S. Ct. 77, 80, 32 L. Ed. 405 (1888). ("As the writ of *habeas corpus* does not perform the office of a writ of error or an appeal, [the facts establishing guilt] cannot be re-examined or reviewed in this collateral proceeding.") (emphasis in original).

The jury in this case was able to assess facts material to whether Perez was a "family man" or whether he was involved with drugs. The twelve triers of facts, not the experts, bore the responsibility of deciding the case. They alone assessed the demeanor and credibility of the witnesses, and their determinations are accordingly entitled a high

measure of deference by reviewing courts. Ultimately, the jury resolved conflicts in testimony on the issue of Perez's sanity and reasonably rejected evidence of insanity.

The Fifth Circuit's opinion affirming the granting of the *habeas* petition in this case perniciously departs from the decisions of this Court in Head v. Hargrave, supra, and Jackson v. Virginia, supra. Further, the legal engine of cross-examination, hailed by this Court as a "tool to flesh out the truth," has likewise been emasculated. Accordingly, the attention of this Court is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX A-OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED MAY 29, 2008

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-30082

SALVADOR PEREZ

Petitioner-Appellee

v.

BURL CAIN, Warden, Louisiana State Penitentiary,

Respondent-Appellant

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division, 2:04-CV-1905

Before REAVLEY, JOLLY, GARZA, Circuit Judges.

The State of Louisiana, through the Respondent, Warden Burl Cain, appeals the district court's judgment granting the 28 U.S.C. § 2254 petition of Salvador Perez. Perez was convicted of first-degree murder of a police officer and sentenced to life in prison for shooting New Orleans Police Officer Chris McCormick. Perez asserted at trial that he was not guilty by reason of insanity. We agree with the thorough and well-reasoned opinion

of the district court that the state court unreasonably applied established Supreme Court precedent concerning sufficiency of the evidence because Perez established at trial that he was insane at the time of the offense and that no rational juror could have found otherwise. We therefore AFFIRM the district court's judgment.

I. Factual and Procedural Background

The factual background of the events leading to Perez's arrest is set forth at length in both the state court decision on Perez's direct appeal and in the district court's opinion granting habeas relief.[1] Perez is currently a 61-year old Mexican citizen who formerly resided legally with his wife, Rosa, and five children on a small farm in Seguin, Texas. On the morning of July 15, 1996, Perez told his wife that he was going out to feed the cows. Instead, he left home with his 12-year old son, Salvatore Perez, Jr., and began a drive that ended with the tragic death of a police officer in New Orleans. Believing that he was being pursued by people who wanted to kill him, Perez proceeded from Seguin toward Florida, where he had once lived. He constantly checked his mirrors for his pursuers and increased his speed to "lose" the other vehicles that he believed were chasing him.

1
See State v. Perez, 745 So.2d 166 (La.Ct.App.1999); Perez v. Cain, 2008 WL 108661 (E.D.La. Jan. 8, 2008).

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Salvatore Perez, Jr. testified that his father drove on back roads and that he was preoccupied with other vehicles. When they stopped at a convenience store at one point, Perez suddenly became scared and began sounding the horn for his son to return to the vehicle so they could quickly leave. Salvatore Jr. described his father's hands as shaking and also reported that Perez would frequently push buttons on the roof of the vehicle, believing this action would throw off the pursuers. Perez also called his wife Rosa and reported that someone was trying to kill him and that a black car was following him. He also believed that Rosa was being held hostage.

Salvatore Jr. later told police that he and his father slept in a park on the first night. At about 4:00 a.m. or 5:00 a.m., Perez awoke and saw a brown Chevrolet truck in the park that he thought was looking for him. Perez next believed that a reddish car at a gas station was following him. Upon reaching New Orleans, Perez and his son ended up at the Fair Grounds. Salvatore Jr. told police that Perez saw the same black car at the Fair Grounds that had been following them from Texas, and Perez thought that "gangsters" who were chasing him were resting in the racetrack barns.

On the morning of July 17, 1996, a Fair Grounds security guard encountered Perez and his son while investigating a report of a suspicious man near the barns. Perez held a small black handgun at

his side. He pulled his son close to him and told the guard to leave him alone and not "to take his kid." The guard retreated to call the police, but when police arrived Perez was not found. Later that evening, the Fair Grounds security discovered Salvatore Jr. alone and took him into custody. A police officer testified that Salvatore Jr. said he and his father had come to New Orleans in a van, that they were being pursued by gangs from Texas, and that his mother knew about Perez's behavior. The officer testified that Salvatore Jr. also said that his father had "ripped off drug dealers." The officer located Perez's vehicle parked behind the Fair Grounds and had it impounded, but no drugs were ever found.

At approximately 10:30 p.m., a woman living adjacent to the Fair Grounds observed a man, possibly holding a gun, in her backyard shed where the hot water heater was located. Police were called, and Officer McCormick and his partner Officer Artie Jackson responded. Officer McCormick proceeded quickly down the back stairs of the apartment. Upon reaching the bottom step, a single shot rang out, striking McCormick in the chest. Officer Jackson immediately called for assistance and numerous officers responded. A canine unit discovered Perez hiding under the house next door. During the apprehension, Perez shot the police dog and was himself shot twice by police.

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The state trial court appointed doctors to examine Perez and conducted several lunacy hearings to determine Perez's competency. Dr. Raphael Salcedo and Dr. Sarah Deland initially deemed Perez competent to stand trial, but in August 1997 Perez was determined to be a danger to himself or others and was transferred to the Feliciana Forensic Facility (FFF). Dr. David Carrington was Perez's treating psychiatrist at FFF. Dr. Carrington testified that Perez was not competent at the time of his admission to FFF. In Dr. Carrington's opinion, Perez had a disorganized thought process and a difficulty communicating that was not uncommon with someone who has a significant degree of mental illness. Dr. Carrington testified that Perez had auditory hallucinations of music and the sound of machinery. He also had delusions, such as the belief that he could communicate with his wife telepathically. Dr. Carrington testified on cross-examination that it was "possible" Perez's confinement prior to his transfer to FFF could have contributed to his condition at the time of the initial examination. Dr. Carrington gave Perez the anti-psychotic medication Haldol and examined him on a weekly basis for the first two months of his stay at FFF. Perez's condition improved somewhat after three weeks of taking Haldol, but he still had disorganized thought processes. Dr. Carrington increased the medication dosage, and Perez was eventually restored to competency. He was transferred back to Orleans Parish for trial in December 1997.

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Perez conceded that he shot Officer McCormick but defended on the ground of insanity. Perez's defense included lay testimony from his wife and his son, Salvatore Jr. It also consisted of expert testimony from seven psychiatric experts about his delusions, including Dr. Salcedo and Dr. Deland. All seven experts agreed that Perez suffered from severe mental illness and delusions of paranoia and persecution. All seven experts also agreed that Perez was not malingering or feigning his mental condition. Six of the experts testified that Perez's mental illness prevented him from knowing right from wrong on the night of the shooting. The seventh expert, Dr. Carrington, was not asked about Perez's sanity at the time of the offense. Five of the experts were either court appointed or otherwise employed by the state.

Rosa Perez testified that approximately two weeks before her husband left home, he became very quiet and "edgy" in his behavior. She testified that Perez would often look out the window and whisper as if someone were watching or listening to him. She also implied that the night before he left, Perez had been afraid to go outside. On cross-examination, the state confronted Rosa with a statement she had given to Detective Joseph Catalanotto after the shooting. When the police had asked her whether Perez had any history of psychological problems, Rosa had responded, "No. Not that I know of." The

statement also showed, however, that Rosa said Perez had been acting strangely for several days.

The state also asked Rosa about a report from psychologist Dr. Carlos Kronberger, wherein Rosa reported that she did not remember Perez acting strangely the day he had left home.

Salvatore Jr. also testified that in the weeks before his father drove to New Orleans, Perez had grown quieter and more suspicious. He further described, as noted above, Perez's odd behavior in trying to evade pursuers. On redirect-examination, he admitted telling Detective Catalanotto that he thought a friend of his step-grandfather's had asked Perez to become involved in drug activities but Perez had declined. He also admitted stating that his father thought he had done something to make the "drug buyers" angry, but that he had also insisted his father was not involved with drugs.

The state did not call any expert witnesses or present any expert medical opinions concerning Perez's mental state. It also did not offer any lay testimony on the issue. Instead, it relied on its cross-examination of Perez's witnesses, and it called Detective Catalanotto as a rebuttal witness to testify about the statements from Rosa and Salvatore Jr. The state's theory throughout the trial was that Perez and his family fooled the medical experts by making up the story that Perez feared someone was trying to kill him.

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The jury found Perez guilty and recommended life imprisonment. The trial court sentenced Perez to life imprisonment at hard labor, without the benefit of parole, probation, or suspension of sentence.

On direct appeal, Perez argued, among other things, that the evidence was insufficient for a rational jury to conclude that he failed to prove he was insane. The Louisiana Fourth Circuit Court of Appeal disagreed and affirmed the conviction.[2] The court noted that two of the experts, Dr. Salcedo and Dr. Deland, initially had found Perez to be competent but later changed their opinions.[3] The court also held that all the doctors who had testified that Perez did not know right from wrong based their opinions on information obtained from Perez's wife and son but that Rosa Perez's testimony was inconsistent with her pretrial statements and that Salvatore Jr.'s statements about drug dealers provided a rational explanation for Perez's behavior.[4] The court concluded that all of Perez's actions were "consistent with a man fleeing from rebuffed drug

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2
Perez, 745 So.2d at 181-85.

3
Id. at 182.

4
Id. at 183-84.

dealers."[5] The court also found that the opinions that Perez had disorganized thinking were rendered in examinations conducted long after the shooting, thereby undermining the opinions that Perez was insane at the time of the offense.[6] The state court held that even assuming Perez was not malingering, the experts' opinions hinged on Perez having delusional beliefs, but the record supported the view that Perez "may very well have been justified in his fears."[7] The Louisiana Supreme Court denied Perez's application for writs.[8] Perez also unsuccessfully sought state post-conviction relief.

Perez then filed the instant § 2254 petition. The district court granted the petition, holding that the state court had unreasonably applied federal law concerning sufficiency of the evidence.[9] The district

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5
Id. at 184.

6
Id.

7
Id. at 185.

8
State v. Perez, 768 So.2d 32 (La.2000).

9
The district court also held that habeas relief was warranted because the state had improperly withheld a witness's

court held that there was no objective reason for the jury to have disregarded the opinions of the disinterested medical experts because the state failed to impinge the experts' veracity, motives, or qualifications. The district court held that the record does not support the state court's conclusion that the experts' opinions could be undermined by impugning Perez's wife and son because the doctors testified to relying on many other sources of information, including personal examination, arrest reports, witness testimony, and Perez's behavior and actions at the scene. Furthermore, all the doctors ruled out that Perez was faking his condition. The court also observed that, contrary to the state court's finding that Perez's behavior could be explained by flight from drug dealers, there was no evidence that Perez was ever being pursued. In an amended judgment the district court ordered the state to enter a finding of not guilty by reason of insanity and to conduct proceedings in accordance with La.Code Crim. Proc.

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statement in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and Perez's trial counsel had rendered ineffective assistance by failing to object to emotional and prejudicial evidence. Although the state has also appealed the district court's grant of relief on these grounds, we need not address these issues because we agree with the district court's conclusion that Perez proved he was insane.

art. 654.[10] We granted the state's motion to stay the district court's judgment pending appeal.

II. Standard of review

When reviewing the grant of habeas relief, this court reviews the district court's factual findings for clear error and conclusions of law de novo.[11] The Antiterrorism and Effective Death Penalty Act of 1996 requires a deferential scheme when reviewing claims in a state prisoner's habeas corpus petition that were adjudicated on the merits in state court.[12] A federal court may not grant a state prisoner's petition unless the state court's determination was "contrary to" or an "unreasonable application of" clearly established federal law as determined by the Supreme Court, or was "based on an unreasonable

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Louisiana law requires the trial court to determine at a hearing whether a defendant charged with a felony other than in a capital case and adjudged not guilty by reason of insanity is a danger to others or himself, or whether he can be released on probation. If the defendant is found to be a danger to others or himself, the court shall order him committed to a state or private mental institution. La.Code Crim. Proc. art. 654.

11
Ramirez v. Dretke, 396 F.3d 646, 649 (5th Cir.2005).

12
See 28 U.S.C. § 2254(d); Hill v. Johnson, 210 F.3d 481, 484-85 (5th Cir.2000).

determination of the facts in light of the evidence" presented to the state court.[13] A decision is contrary to clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts."[14] A state court's decision involves an unreasonable application of clearly established federal law if the state court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case."[15] An unreasonable application differs from an incorrect application; thus, a federal habeas court may correct what it finds to be an incorrect application of law only if the application also is objectively unreasonable.[16] A state court's factual determination

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2254(d); see Santellan v. Cockrell, 271 F.3d 190, 192 (5th Cir.2001).

14
Williams v. Taylor, 529 U.S. 362, 412-13, 120 S.Ct. 1495, 1523, 146 L.Ed.2d 389 (2000).

15
Id. at 407-08, 120 S.Ct. at 1520.

16
See id. at 409-11, 120 S.Ct. at 1521-22.

is presumed to be correct and can be rebutted only by a showing of clear and convincing evidence.[17]

III. Discussion

The state challenges the district court's conclusion that the evidence was insufficient for the jury to find that Perez failed to show he was insane. In a federal habeas corpus proceeding, the Supreme Court's decision in Jackson v. Virginia provides the standard for testing the sufficiency of the evidence.[18] The question "is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[19] This standard is applied with "reference to the substantive elements of the criminal offense as defined by state law."[20]

In Louisiana, a criminal defendant is presumed to be sane and responsible for his

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28 U.S.C. § 2254(e)(1).

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443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

19
Id. at 319, 99 S.Ct. at 2789.

20
Id. at 324 n. 16, 99 S.Ct. at 2792 n. 16.

actions.[21] The defendant may rebut this presumption based on a preponderance of the evidence.[22] "Legal insanity is proved if the circumstances indicate that a mental disease or mental defect rendered the offender incapable of distinguishing between right and wrong with reference to the conduct in question."[23] In light of Louisiana law on the issue of insanity, the question under the Jackson sufficiency standard is whether, viewing the evidence in the light most favorable to the state, any rational trier of fact could have found beyond a reasonable doubt that Perez did not prove by a preponderance of the evidence that he was insane at the time of the offense.[24]

21
La.Rev.Stat. § 15:432; State v. Peters, 643 So.2d 1222, 1225 (La.1994).

22
La.Rev.Stat. § 15:652; see State v. Silman, 663 So.2d 27, 32 (La.1995).

23
Peters, 643 So.2d at 1225 (citing La.Rev.Stat. § 14:14).

24
See id.; see also Donahue v. Cain, 231 F.3d 1000, 1004 (5th Cir.2000).

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The state appellate court invoked the Jackson standard in Perez's direct appeal.[25] Therefore, because the state court identified the correct legal standard, we must determine whether that court's application of that standard was objectively unreasonable.[26]

The state was not required to present expert evidence to contradict Perez and establish that he was sane. Lay testimony alone may be used to successfully rebut an expert's opinion.[27] We have recognized with respect to insanity, however, that "the opinions of experts may not be arbitrarily ignored" and that "some reason must be objectively present for ignoring expert opinion testimony."[28] Expert evidence may be rebutted "by showing the incorrectness or inadequacy of the factual assumptions on which the opinion is based, 'the reasoning by which he progresses from his material to his conclusion,' the interest or bias of the expert,

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25
Perez, 745 So.2d at 181.

26
See Williams, 529 U.S. at 413, 120 S.Ct. at 1523.

27
See Peters, 643 So.2d at 1226; Brock v. United States, 387 F.2d 254, 257 (5th Cir.1967).

28
Brock, 387 F.2d at 257.

inconsistencies or contradictions in his testimony as to material matters, material variations between the experts themselves, and defendant's lack of co-operation with the expert."[29]

Even though the state did not present any direct evidence of Perez's mental condition, the state appellate court concluded that the evidence was sufficient for the jury to find Perez did not show he was insane for essentially three reasons: first, that there was a substantial delay, ranging from nine to seventeen months, between the shooting and the experts' examinations of Perez; second, that the experts based their opinions on information provided by Rosa Perez and Salvatore Perez, Jr., whose information about Perez's history was inconsistent with pretrial statements and therefore unreliable; and third, that all of Perez's behavior was consistent with and could be explained by his fear of rebuffed drug dealers. The state also advances these reasons in its appellate brief for reversing the district court's grant of habeas relief. All of the factors considered in the state court's decision purport to undermine the bases for the opinions of the psychiatric experts who testified at trial that Perez was insane.

29
Mims v. United States, 375 F.2d 135, 143-44 (5th Cir.1967) (footnotes and citations omitted).

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At the outset, we note that all of the experts who testified at trial that Perez was insane at the time of the offense were consistent in their opinions that Perez suffered from a severe mental illness.[30]

All of the experts were well-qualified, as the state stipulated at trial. Most of the experts were also disinterested due to their capacities as court appointees or employees of the state.[31] The state appellate court, however, failed to include the experts' qualifications and disinterested status in its calculus of what a rational jury could have found when considering the expert opinions.[32]

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The diagnoses included "chronic paranoid schizophrenic" (Dr. Kenneth Ritter); "atypical psychosis ... delusional disorder" (Dr. Raphael Salcedo); "psychosis not otherwise specified" with "prominent symptoms of paranoia and persecution" (Dr. Jose Pena); "delusional disorder, persecutory type" (Dr. Guillermo Urrutia); "psychotic disorder similar to schizophrenia" (Dr. Sarah Deland); and "delusional disorder, persecutory type, severe" (Dr. Carlos Kronberger).

31
Dr. Ritter, Dr. Salcedo, and Dr. Deland were all appointed by the court to the sanity commission. Dr. Carrington was employed by the state as a staff member at FFF. Dr. Pena examined Perez at the request of the FFF staff.

32
See Brock, 387 F.2d at 258 (holding that single lay witness's testimony was insufficient to rebut "the opinion of a skilled and disinterested government psychiatrist, which opinion is in

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With respect to the delay in the experts' examinations of Perez, the state appellate court found that the experts' opinions about Perez's status at the time of the offense were undermined for essentially two reasons. First, the court noted that a Charity Hospital record from the night of the shooting reported that when Perez was brought to the hospital he was "oriented, responsive, and obeying commands."[33] Second, Dr. Carrington "admitted that Perez's condition at the time he first examined him at the FFF in August 1997 could have been attributed in some part to his thirteen months of incarceration in Orleans Parish prison."[34] The state court apparently reasoned that a rational jury could have found that these facts together gave a more accurate picture of Perez's mental state at the time of the offense than the experts' subsequent examinations. We disagree.

The Charity Hospital notation cannot be considered in a vacuum. Dr. Carrington, the only expert who was asked about the record, explained that "oriented" meant that Perez knew who he was, where he was, and generally what time it was. He

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no way impugned or discredited").

33
Perez, 745 So.2d at 184.

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Id.

testified that "responsive" meant that Perez was "essentially ... not unconscious." Furthermore, Dr. Urrutia testified that when he examined Perez and formulated his opinion, he considered the Charity Hospital records. Therefore, Dr. Urrutia was aware of Perez's reported state at the time he was admitted to the hospital with two gunshot wounds, and he still concluded that Perez was insane at the time of the offense. Significantly, none of the doctors were asked whether the Charity Hospital notation changed their opinion.

Dr. Carrington did testify that it was "possible" Perez's pretrial incarceration could have contributed to the condition in which he found Perez in August 1997. However, Dr. Carrington was not asked whether the incarceration was the sole cause of Perez's condition or even the degree to which Perez may have been affected, and he was not asked whether Perez was sane at the time of the offense. The jury was given nothing from which it could draw an inference about Perez's mental state on the night of the offense from Perez's pretrial incarceration "possibly" contributing to his state in August 1997. There was simply no rational basis for a jury to infer that Perez was sane at the time of the shooting and became insane due only to his living conditions after apprehension.

The state appellate court also apparently concluded that the delay between the shooting and the experts' examinations significantly undermined

the expert opinion because two of the experts, Dr. Salcedo and Dr. Deland, both initially found Perez to be competent to stand trial and later changed their opinions. The state trial court appointed both doctors to the sanity commission to determine Perez's competency. Both explained that they initially found Perez competent because he was vague during questioning and provided minimal answers, such as "I don't know" or "I don't remember." The doctors revised their opinions when they received more information and as Perez became more communicative. Dr. Salcedo recognized his earlier opinion and testified that he thought Perez may have been malingering. Dr. Salcedo could not conclusively rule out a delusional disorder, however. In an abundance of caution, he and Dr. Deland recommended that Perez be placed at FFF, where the issue of malingering could be better assessed because Perez would be under 24-hour observation. As noted above, Perez was ultimately placed on anti-psychotic medication at FFF. Dr. Deland further explained that the circumstances of her first interview with Perez, conducted in the presence of several others, including attorneys and a court reporter, presented an intimidating environment that could explain Perez's initial reticence. She also testified that it is not unusual for a paranoid individual to initially present as competent.

We agree with the district court that although the two doctors' opinions changed, the change did not undermine their ultimate unequivocal opinion

that Perez was insane and was not malingering. We also agree that in the absence of contrary evidence, or inconsistencies in the reports of the other experts, the revisions by Dr. Salcedo and Dr. Deland were not sufficiently material to provide the jury with a rational basis to disregard the testimony of all seven mental health experts.

We further agree with the district court's conclusion that impugning the veracity of Perez's wife and son was insufficient to permit the jury to ignore the experts' opinion and conclude that Perez was sane. Although the doctors did receive important information from Rosa Perez and Salvatore Jr., they did not rely solely on that information when formulating their opinions. They also considered information from personal examinations of Perez, test results, arrest reports, and witness testimony. Significantly, Dr. Kronberger testified that his conclusion was based on Perez's behavior during five or six examinations, spanning 14 hours, and that information provided by Perez's family "just added a little bit of flavor." Dr. Deland testified that Perez exhibited classic signs of a delusional belief system during examination. Dr. Ritter testified that he also obtained information from Perez and from the FFF records. Dr. Ritter also testified that he saw a report of Perez's encounter with the Fair Grounds security guard on the morning of the shooting. Dr. Ritter opined that Perez's action in grabbing his son in a protective manner and his belief that the security guard might

kidnap his son were typical of Perez's delusional belief system. As noted above, Dr. Urrutia examined the Charity Hospital records. Dr. Salcedo examined the arrest report and testimony at preliminary hearings. Dr. Pena testified that all available information goes into forming an opinion. It is clear that the doctors considered a wide array of information apart from interviews with Perez's wife and son when forming their opinions. As the district court found, given that the experts' credentials and interests were untainted, their opinions could not be undermined simply by attacking the stories of Perez's wife and son.

Both Dr. Pena and Dr. Urrutia testified that Perez's improvement with medication and treatment at FFF also demonstrated his illness. A defendant's responsiveness to medication and therapy is an accepted indicator of insanity.[35] Perez's condition improved once he began taking the anti-psychotic drug Haldol, and in fact his disorganized thinking did not sufficiently improve to render Perez competent until Dr. Carrington increased the dosage of medication. The medical experts ruled out that Perez was fabricating his condition in part because a layman would not know what response would be expected from the drugs. The doctors' testimony

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Peters, 643 So.2d at 1226; State v. Roy, 395 So.2d 664, 668 (La.1981).

indicates that a psychotic person does not become competent with medication immediately because the process takes time. Perez exhibited continual signs of delusional behavior, even though he was under 24-hour observation at FFF, and then showed the classic response to the medication. The state introduced no evidence to suggest that Perez's response was not genuine.

The state appellate court also reasoned that a rational jury could conclude Perez was sane because his actions were consistent with a person fleeing from rebuffed drug dealers.[36] The state court reasoned that because information about friends of Perez's step-grandfather being involved with drugs and about Perez spurning those people came from Perez's wife and son, they were not delusions. The state appellate court concluded that the medical experts' opinions were undermined because the opinions were based on Perez having delusions of persecution, but "the record supports the view that [Perez] may very well have been justified in his fears."[37] For example, the state appellate court discounted Dr. Ritter's opinion that Perez had been pushing buttons in the van for some "magical reason" because Perez was "obviously attempting to

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36
Perez, 745 So.2d at 184.

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Id. at 185.

out-wit any pursuers, perhaps making them think that he saw them."[38]

We disagree that the record shows Perez may have been justified in his fears. As the district court held, there was no evidence that there actually were drug dealers in pursuit of Perez. Salvatore Jr. testified that he told police they were being followed by gangs from Texas because his father told him that. He did admit telling police his father thought his step-grandfather's friends sold drugs, but he also told police that his father was not involved with narcotics. Detective Catalanotto confirmed this statement. The record simply provides no basis for a rational jury to conclude that Perez was being chased by drug dealers from Texas, and Perez's behavior may not be so neatly explained away.[39]

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Id. at 184.

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The state appellate court also speculated that Perez, already on the run from drug dealers, could have shot the police officer because he did not want to go to jail after his encounter with the Fair Grounds security guard. Perez, 745 So.2d at 184. The court noted that Dr. Pena testified he could imagine such a scenario. There are several problems with this speculation. First, the lack of evidence of drug dealers undermines the court's hypothesis. Second, Dr. Ritter's testimony showed that Perez's encounter with the security guard was consistent with his delusions. And finally, the state asked Dr. Pena a hypothetical question assuming that Perez had a rational

Furthermore, we agree with the district court that the medical experts personally observed psychotic behavior in Perez independently of whether anyone was pursuing him. For example, Dr. Carrington found that Perez had disorganized thought processes, characterized by difficulty communicating in a coherent manner, and had experienced hallucinations of music and the sound of machinery. Dr. Ritter testified that Perez's action when confronted by the Fair Grounds security guard, who could hardly be mistaken for a drug dealer while clad in uniform, was consistent with the delusions of persecution. Dr. Deland described Perez as presenting "a very classic case" of someone with a delusional belief of being persecuted and threatened. She specifically observed Perez's demeanor during her assessment and noted that people cannot generally manufacture such symptoms while under 24-hour observation, as Perez was at FFF.

The state appellate court's speculative conclusion is also objectively unreasonable. It is objectively unreasonable to conclude that a rational family man with no violent criminal history would suddenly flee with one son, leave his remaining family behind, drive to an unfamiliar city in an

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reason for acting as he did, and Dr. Pena responded equivocally that he "guess[ed] that could be imagined." Dr. Pena's answer, without more, was insufficient for a rational jury to ignore Perez's evidence of insanity.

unfamiliar state, hide in someone's backyard shed, and then shoot a police officer.

We are mindful that a state prisoner's burden is especially heavy on habeas review of the sufficiency of the evidence. The jury's finding of facts will be overturned only when necessary to preserve the "fundamental protection of due process of law."[40]

We agree with the district court, however, that such protection is warranted in this case.

The evidence that Perez produced as to his insanity was overwhelming. It included lay testimony from Perez's wife and son describing a slow progression of odd behavior, which the experts found consistent with classic symptoms of mental illness; lay testimony from his son about bizarre behavior on the drive to New Orleans; consistent expert testimony from largely disinterested doctors that Perez is mentally ill, suffers from delusional behavior, and did not know right from wrong on the night of the offense; expert opinion that it was very unlikely Perez and his family would know how to fake the illness; and objective evidence that once he was given anti-psychotic medication, Perez's condition improved in a manner that a layman would not know how to fabricate. The state produced insufficient evidence solely through

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Jackson, 443 U.S. at 319, 99 S.Ct. at 2789.

cross-examination and argument to controvert Perez's claim. We therefore conclude that Perez established by a preponderance of the evidence that he was insane and that the state appellate court's conclusion that a rational jury could have found otherwise was an objectively unreasonable application of federal law.

The judgment is AFFIRMED. As ordered, the State of Louisiana is to conduct proceedings in accord with La.Code Crim. Proc. art. 654.

APPENDIX B-ORDER AND REASONS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA FILED JANUARY 8, 2008

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION

No. 04-1905

SALVADOR PEREZ

v.

BURL CAIN, Warden,

ORDER AND REASONS

Now before the Court is a petition for habeas corpus relief by Mr. Salvador Perez (hereafter "Petitioner"), pursuant to 28 U.S.C. § 2254. Petitioner seeks relief from a March 14, 1998 conviction of first degree murder of a police officer and sentence of life imprisonment without the possibility of parole. As grounds for relief, Petitioner claims that his due process and fair trial rights were violated because (1) there was insufficient evidence to rebut his defense of legal insanity; (2) there was insufficient evidence to support his conviction of first degree murder of a police officer; (3) the state

withheld material evidence supporting his insanity defense; (4) the trial court commented on the evidence and/or gave erroneous jury instructions; (5) the trial court refused to allow the jury to view written reports by experts or, in the alternative, failed to declare a mistrial when the state made false statements concerning those records; (6) he received ineffective assistance of counsel; (7) the trial court erroneously admitted certain evidence and testimony; (8) the trial court failed to provide a proper English-Spanish translation of his trial; and (9) he was not mentally competent at the time of the trial.[1]

After a thorough review of the record, memoranda, and applicable law, the Court finds that the state courts unreasonably applied established Supreme Court precedent in denying Petitioner relief on his claims relating to the sufficiency of the evidence as to the insanity defense, Brady violations, and ineffective assistance of counsel. For the reasons set forth more fully below, this Court finds that

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The petition for habeas corpus and supporting memorandum as well as the state's response brief discuss Petitioner's claims in a slightly different order. Due to the overlap between Petitioner's claims, namely his two assertions of insufficient evidence and the interplay between trial counsel's failure to object to some prejudicial evidence and the trial court's failure to exclude other prejudicial evidence, this Court addresses the issues in the order set forth herein.

Petitioner's due process rights under the United States Constitution were violated when he was convicted despite having proven, by a preponderance of the evidence, that he was insane at the time of the incident; when the state withheld material evidence in violation of Brady v. Maryland; and, when his counsel rendered ineffective assistance of counsel by failing to object to unnecessary and prejudicial evidence, thereby permitting his trial to occur under highly prejudicial circumstances. Accordingly, the petition is GRANTED and Petitioner's sentence is hereby VACATED.

After a thorough review of the record, memoranda, and applicable law, the Court finds that the state courts unreasonably applied established Supreme Court precedent in denying Petitioner relief on his claims relating to the sufficiency of the evidence as to the insanity defense, Brady violations, and ineffective assistance of counsel. For the reasons set forth more fully below, this Court finds that Petitioner's due process rights under the United States Constitution were violated when he was convicted despite having proven, by a preponderance of the evidence, that he was insane at the time of the incident; when the state withheld material evidence in violation of Brady v. Maryland; and, when his counsel rendered ineffective assistance of counsel by failing to object to unnecessary and prejudicial evidence, thereby permitting his trial to occur under highly prejudicial circumstances. Accordingly, the

petition is GRANTED and Petitioner's sentence is hereby VACATED.

I. BACKGROUND & PROCEDURAL HISTORY

Petitioner was convicted of first degree murder on March 14, 1998 for the July 17, 1996 shooting and killing of New Orleans' Police Officer Chris McCormick. At the time of the incident, Petitioner was a citizen of Mexico legally residing in Texas with his wife and five children. The facts giving rise to the shooting and Petitioner's subsequent conviction follow.

On July 17, 1996 Byron Polite, a supervisor of security at the New Orleans Fair Grounds' race track, received a call from a nearby resident that a man and his child were staying in barn twenty-six. In response to the phone call, Polite drove in his golf cart to barn twenty-six where he encountered Petitioner and his twelve-year old son.[2] At Polite's approach, Petitioner pulled his son close to him, drew out a gun, and told Polite, apparently in English, that Polite was not going to take his son

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Rec. Vol. V, Trial Transcript, pgs. 20-21.

and should leave them alone.[3] Polite then retreated and called the police.

Police officers later found Petitioner's son alone near Petitioner's van and took the boy into custody.[4] New Orleans Police Lieutenant Arden Taylor spoke with Petitioner's son to determine the circumstances which led Petitioner and his son to the New Orleans Fair Grounds. While speaking with Lt. Taylor, Petitioner's son indicated that he and Petitioner were from Texas and were in New Orleans because Petitioner, believing that he was being pursued by various persons, including potential drug dealers, had driven himself and his son there to get away from his pursuers. Petitioner's son did not know precisely who the people supposedly pursuing Petitioner were, but indicated his belief that Petitioner had refused to go into business with some drug dealers and that Petitioner believed the drug dealers were following him and his

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3
Officer Polite did not recall the exact words Petitioner used, but indicated at trial that he understood that Mr. Perez wanted to be left alone and said something along the lines of "You're not going to take my kid." Id., at 21, 24-25.

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From the record, it is unclear precisely why Petitioner's son was alone, but Dr. Rafael Salcedo testified that he understood that Petitioner had left his son there while Petitioner went out to look for another vehicle. Id., at 173.

son. With drugs potentially involved, Lt. Taylor brought a canine unit in to sweep the vehicle for narcotics. Despite finding no evidence of drugs, the vehicle was impounded. A later inventory of the van yielded two 3x5 inch memo pads, a note pad, a "Berger Field tool rental," a roadmap of the United States, a receipt for $450.00, a pair of binoculars, a Wal-Mart receipt dated July 13, 1996 from Seguin, Texas, and an ice chest containing matter that appeared to be decayed food.

Around 10:30 p.m. on July 17, Debbie Mastio, the occupant of the upper part of 1437 Leda Court, discovered that she was not getting any hot water and went to her hot water shed to find out why. Ms. Mastio testified that she was descending the backstairs, when she saw a man, whom she later identified as Petitioner, hiding in her shed holding a "shiny, metallic object." Upon seeing Petitioner, Ms. Mastio ran back upstairs, locked the door, and told Dr. Elliott Black, a visiting friend, what had happened.[5] Dr. Black then went out back to investigate and, according to his testimony, saw Petitioner in Ms. Mastio's watershed holding a gun and pointing it at Dr. Black.[6] After retreating back

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5
Rec. Vol. V, Trial Transcript, pgs. 50-51.

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Id., at 65.

into Ms. Mastio's house, Dr. Black and Ms. Mastio called the police.

New Orleans Police Officers Chris McCormick and Artie Jackson responded to Ms. Mastio's call and arrived on the scene sometime before midnight. According to Officer Jackson's testimony, both officers were in uniform, but the patrol car did not have its sirens on or its overhead lights flashing when they approached Ms. Mastio's house.[7] After arriving, Officers McCormick and Jackson were taken through the house to the back stairs. On the stand, Officer Jackson did not recall exchanging any particular words with Dr. Black; Dr. Black testified only that he told the officers "[h]e's right down here. This is very dangerous."[8] Officer McCormick proceeded down the stairs first, with Officer Jackson behind him near the top of the stairs. Officer Jackson testified that Officer McCormick was shot once upon reaching the last stair. After seeing Officer McCormick fall backwards, clutching his chest, Officer Jackson grabbed his radio and called for help.[9] Officer Jackson indicated that the yard

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7
Id., at 76.

8
Id., at 65.

9
Id., at 70-71.

was very dark in certain areas and that it was too dark for Officer Jackson to return any fire.[10]

While Officer Jackson was waiting for more officers to arrive, Petitioner apparently fled the scene. A search of the area was initiated and four canine units were called in to locate Petitioner. Petitioner was found underneath a nearby residence by Max, Officer Harold Chambliss's dog. Officer Chambliss ordered Max under the house and two shots rang out, striking Max, who retreated. Max was sent back under and Chambliss ordered Petitioner, in English, to come out. After Petitioner failed to respond, Officer Chambliss fired two shots, striking Petitioner twice and disabling him. Other officers retrieved Petitioner from under the house. Petitioner was taken to the Medical Center of Louisiana to receive treatment for his wounds, before being taken into custody. A drug test taken at the hospital returned no traces of narcotics or alcohol in Petitioner's blood.

Prior to going to trial, Petitioner's attorney claimed that Petitioner was incompetent and sought the appointment of a sanity commission to determine Petitioner's competency. Dr. Rafael Salcedo and Dr. Sara DeLand were appointed to evaluate Petitioner and testified that he was

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Id., at 75-76.

competent to proceed to trial at a lunacy hearing held on January 30, 1997.[11] Based on this testimony, the trial court found Petitioner competent to proceed. Petitioner's attorney again raised the issue of competency and following three additional lunacy hearings, the trial court found Perez dangerous to himself and others and remanded him to the Feliciana Forensic Facility. At Feliciana, Dr. David Carrington evaluated Petitioner, determined that he was psychotic, and began treating Petitioner withthe anti-psychotic medicine Haldol.[12] Dr. Carrington indicated that Petitioner responded positively to Haldol, and after further evaluation and another lunacy hearing, Petitioner was found competent to proceed to trial.[13]

At Petitioner's trial, defense counsel conceded in opening statement that Petitioner shot and killed Officer McCormick on July 17, 1996. The primary issue in dispute was, therefore, Petitioner's sanity at the time of the incident. The state's case consisted of the testimony of numerous New Orleans Police

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11
Id., at 231.

12
Id., at 217-18.

13
Id., at 221-27.

Officers.[14] The 911 tape of Officer Jackson requesting help was played at the end of the state's direct examination of Officer Jackson and again during closing arguments.[15] In addition to the police officers, the state called Debbie Mastio and Doctor Elliot Black who testified to the events bringing Officers Jackson and McCormick into contact with Petitioner; Doctor Myron Smith, a veterinarian who testified about the wounds Max, the canine dog, suffered; Doctor William Newman, a pathologist who performed the autopsy on Officer McCormick and testified that the cause of death was a single gunshot wound to the chest; and Danine McCormick, the slain officer's widow. The state called no doctors or psychologists to rebut the defense evidence of insanity. In fact, none of the state's witnesses testified that they had extended contact with Petitioner and none of them indicated that they had any experience dealing with or diagnosing persons suffering from mental illness.

Having conceded that Petitioner shot Officer McCormick, Petitioner's defense consisted of

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14
Fourth Circuit Opinion, State v. Perez, 98-KA-1407, November 3, 1999. For a comprehensive statement of the testimony offered by each witness at trial, see pgs. 2-19 of opinion.

15
Rec. Vol. V, Trial Transcript, p. 72.

testimony from seven expert witnesses who had examined Petitioner for mental illness, Petitioner's wife, Rosa Perez, and Petitioner's son, Jose Perez. Petitioner's wife and son testified that Petitioner had been behaving oddly for a few weeks prior to July 15, 2006. Specifically, they indicated that he had been acting paranoid, whispering, and acting very secretive as though people were watching him.[16] Petitioner's wife and son also testified that Petitioner left Texas with his son because he believed that various persons from Texas were following him and that he was on his way to Florida, where Petitioner and his family used to reside, when he stopped in New Orleans.[17] Petitioner's son stated that Petitioner exhibited paranoid behavior throughout the trip, including refusing to stop for food, pushing buttons on the roof of the car in an attempt to lose people supposedly following them, varying his speed to lose his pursuers, and having shaking hands.[18] Petitioner's son admitted during his testimony that he had told police officers that Petitioner believed he was fleeing from rebuffed drug dealers, but went on to say that he had not actually

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16
Id., at 239.

17
Id., at 240, 246, 248-50, 270-71.

18
Id., at 249-251.

believed that Petitioner was being pursued by rebuffed drug dealers or any other persons from Texas.[19] Other than statements indicating that Petitioner feared that drug dealers were pursuing him, no evidence linking Petitioner to drugs or drug dealers was ever found or presented to the jury.

To rebut the testimony of Petitioner's wife and son, the state called Detective Joseph Catalanotto who stated that when he asked Mrs. Perez in July 1996 whether her husband had any psychological problems, she replied "[n]o, not that I know of."[20]

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Id., at 256-58.

20
While this statement is arguably inconsistent with her later saying that he was acting strangely, there is no contention that it is factually incorrect. The record indicates that Petitioner had never been diagnosed as mentally ill prior to the incident. Nor would Petitioner's wife necessarily have been able to diagnose Petitioner as mentally ill in this case. As Dr. Carlos Kronberger, among others, indicated that these types of disorders may be hard for laymen to diagnose because a mentally ill individual will act strangely but not as overtly psychotic as one might assume. Id., at 273. Dr. Jose Pena also testified that Petitioner's wife "knew he was suspicious, but she really wasn't sure what was going on" and that this is "much more consistent with the kind of history you would hear by a concerned loved one when they see a change in somebody that's close to them." Id., at 187.

Detective Catalanotto further stated that Petitioner's son had indicated that Petitioner rejected his step-father's offer to engage in some kind of narcotics business. He did not indicate whether this actually resulted in Petitioner's relatives or other persons following Petitioner or whether Petitioner's boy felt threatened by any relatives or other persons in Texas.

In addition to Petitioner's wife and son, Petitioner offered the testimony of seven psychiatrists and psychologists who had examined Petitioner at various points after the shooting. Six of Petitioner's mental health experts testified that they had evaluated Petitioner and that it was their expert opinion that Petitioner had been insane and incapable of distinguishing between right and wrong at the time of the incident.[21] They also testified that they had personally evaluated Petitioner,[22] that they

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Rec. Vol. 5, Trial Transcript, pgs. 137-38, 40 (Dr. Kenneth Ritter); pgs. 170-71 (Dr. Raphael Salcedo); pgs. 184, 187 (Dr. Jose Pena); pgs. 172, 202 (Dr. Victoria Urrutia); pgs. 230, 233 (Dr. Sarah DeLand); p. 267 (Dr. Carlos Kronberger).

22
See Rec. Vol. V, Trial Transcript, pgs. 136, 142, 202 (Dr. Ritter); pgs. 161, 163 (Dr. Salcedo); p. 183 (Dr. Pena); p. 196 (Dr. Urrutia); pgs. 213-14, 217 (Dr. David Carrington testifying that Petitioner was under constant supervision and that he met with Petitioner two times weekly for several months); p. 230 (Dr. DeLand); pgs. 264, 278, 280 (Dr.

had considered the possibility that Petitioner might be malingering, and that they had expressly ruled out such possibility.[23] In addition, the seventh expert, Dr. Carrington, the state-employed doctor working at Feliciana who was charged with restoring Petitioner to competency, testified that Petitioner exhibited psychotic behavior upon his arrival at Feliciana and that he was prescribed Haldol, an anti-psychotic medication.[24]

Dr. Carrington was not asked and did not indicate whether he believed that Petitioner was incapable of distinguishing between right and wrong at the time of the offense, but he stated that Petitioner was mentally ill and that he did not believe Petitioner was malingering.

The state did not call a single expert witness or present lay testimony directly addressing Petitioner's mental state around the time of the

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Kronberger stating that he "interviewed him exhaustively" and primarily based his diagnosis on his personal observations of Petitioner).

23
Rec. Vol. V, Trial Transcript, p. 138 (Dr. Ritter); pgs. 185-87 (Dr. Pena); pgs. 200-01 (Dr. Urrutia); pgs. 219-20 (Dr. Carrington); pgs. 232-33 (Dr. DeLand); Testimony of Dr. Kronberger, pgs. 266-07.

24
Id., at 217-20.

incident. Petitioner's trial before a 12-person jury took place on March 11-14, 1998. After the jury found Petitioner guilty of first degree murder, the jury unanimously recommended life imprisonment in the penalty phase. Petitioner sought a judgment of acquittal or a new trial following the verdict, which was denied March 27, 1998. Waiving legal delays, Petitioner was sentenced to life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence. A notice of appeal was filed on the date of sentencing.

On appeal, Petitioner argued that there was insufficient evidence to support the jury's verdict and that Petitioner's counsel was not qualified to represent him because one of his attorneys was a third-year law student. The Louisiana Fourth Circuit Court of Appeal affirmed Petitioner's conviction and sentence,[25] and the Louisiana Supreme Court denied writs.[26]

25
State v. Perez, 745 So.2d 166, 188 (La.App. 4 Cir.1999).

26
Rec. Vol. V, Writ Denied, State v. Perez, 1999-K-3372, September 22, 2000.

Appendix B

Petitioner filed his application for post-conviction relief on September 20, 2001,[27] in which he claimed that his right to due process was denied by the jury convicting him despite evidence of insanity; the judge giving erroneous jury instructions regarding specific intent with regard to the requisite intent to harm a police officer; the judge erroneously excluding evidence in the form of expert reports; his trial and appellate counsel providing ineffective assistance; the trial court's failing to provide translation of the trial; the trial court's erroneously admitting prejudicial evidence; the prosecution withholding material evidence in violation of Brady v. Maryland; the court affirming his conviction based on an incomplete record; the court erroneously finding him competent; violation of his rights against double jeopardy; and violation of his confrontation rights. His application was denied by the state district court, after an evidentiary hearing, on January 28, 2003.[28] After denial by the Fourth Circuit Court of Appeal, the Louisiana

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27
Rec. Vol. VI, Application for Post-Conviction Relief, Perez v. Cain, No. 385-086, Section "A".

28
Rec. Vol. VI, Transcript of Post Conviction Hearing, State v. Perez, No. 385-086, January 28, 2003.

Supreme Court denied writs on July 2, 2004.[29] Petitioner filed this federal application for habeas corpus on July 6, 2004.[30]

II. JURISDICTION

Jurisdiction is proper under the Antiterrorism and Effective Death Penalty Act (AEDPA) if the petitioner is "in custody" under the conviction he is attacking.[31] Petitioner is confined at the Louisiana State Penitentiary in Angola, therefore jurisdiction is proper.

III. VENUE

Venue is proper under AEDPA in the district where the inmate is in custody or where the state court conviction and sentence were obtained.[32]

29
Rec. Vol. VII, State v. Perez, 2003-KP-2814, July 2, 2004.

30
Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus, Perez v. Cain, No. 04-1905.

31
28 U.S.C. § 2241(c)(3); 28 U.S.C. § 2254(a).

32
28 U.S.C. § 2241(d).

Petitioner was convicted and sentenced in Orleans Parish, therefore venue in the Eastern District of Louisiana is proper.

IV. TIMELINESS

The state submits that the petition is timely, and after reviewing the record this Court agrees. Generally speaking, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires that a petitioner bring his Section 2254 claims within one year of the date on which his conviction became final.[33] Pursuant to 28 U.S.C. § 2244(d)(1)(A), Petitioner's one-year limitation period for seeking federal habeas corpus relief commenced running on the date the judgment "became final by the conclusion of direct review or the expiration of the time for seeking such review." Petitioner's direct appeal was denied by the Supreme Court of Louisiana on September 22, 2000 and he did not appeal to the United States Court Supreme Court. Petitioner's conviction became final ninety days after the Supreme Court of Louisiana denied his application for supervisory writs, on December 21, 2000.

On this date, the one-year statute of limitations for filing a federal habeas corpus petition

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28 U.S.C. § 2244(d).

began to run.[34] However, AEDPA's one-year statute of limitations is tolled for the period during which a properly filed application for post state conviction relief or other collateral review attacking a conviction or sentence is pending in state court.[35] A total of 273 days passed from December 21, 2000 until September 20, 2001, when Petitioner filed his motion for post conviction relief.[36] The statute of limitations was tolled while Petitioner's application for state post-conviction relief was pending in the state courts. The Louisiana Supreme Court denied writs on Petitioner's post-conviction relief on July 2, 2004.[37] Petitioner filed the instant petition on July 6, 2004. Allowing tolling for the period during which Petitioner's state applications were pending, a total of 277 days lapsed, which is within the statute of limitations.

34
See Roberts v. Cockrell, 319 F.3d 690, 694 (5th Cir.2003); Ott v. Johnson, 192 F.3d 510, 513 (5th Cir.1999).

35
See Fields v. Johnson, 159 F.3d 914 (5th Cir.1998); 28 U.S .C. § 2244(d)(2).

36
Rec. Vol. VI, Application for Post-Conviction Relief, Perez v. Cain, No. 385-086, Section A.

37
Rec. Vol. VII, State v. Perez, 2003-KP-2814, July 2, 2004.

For the reasons stated above, the Court finds the petition for a writ of habeas corpus now before the Court timely.

V. EXHAUSTION

Petitioner has exhausted available state remedies as required by AEDPA. Under AEDPA, a petitioner must first exhaust his remedies in state court before seeking habeas relief from the federal courts.[38] "To exhaust, a petitioner must have fairly presented the substance of his claim to the state courts."[39] Generally, the exhaustion requirement is satisfied only when the grounds urged in a federal habeas petition were previously presented to the state's highest court in a procedurally proper manner according to state court rules.[40]

Petitioner presents nine claims for review in his federal habeas petition as listed above. Each of these claims was raised in his application for writs of certiorari and review to the Louisiana Supreme

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38
28 U.S.C. § 2254(b)(1)(A).

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Wilder v. Cockrell, 274 F.3d 255, 259 (5th Cir.2001) (internal quotation marks omitted).

40
Dupuy v. Butler, 837 F.2d 699, 702 (5th Cir.1988).

Court on direct appeal and/or in his application for post conviction relief.[41] Accordingly, Petitioner has satisfied AEDPA's exhaustion requirement. Therefore, the Court addresses Petitioner's claims on the merits.

VI. STANDARD OF REVIEW

AEDPA comprehensively overhauled federal habeas corpus legislation, including 28 U.S.C. § 2254. Amended subsections 2254(d)(1) and (2) contain revised standards of review for questions of fact, questions of law, and mixed questions of fact and law.[42] Provided that the state court adjudicated the claim on the merits, pure questions of law and mixed

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Rec. Vol. V, Fourth Circuit Opinion, State v. Perez, 98-KA-1407, November 3, 1999; and State Rec. Vol. 7, Application for Writ of Certiorari, October 10, 2003.

42
28 U.S.C. § 2254(d):An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

questions of law and fact are reviewed under § 2254(d)(1) and questions of fact are reviewed under § 2254(d)(2).[43] As to questions of law and mixed questions of law and fact, a federal court must defer to the state court's decision unless it "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[44] The United States Supreme Court has noted the following:§ 2254(d)(1)'s "contrary to" and "unreasonable application" clauses have independent meaning. A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts. The court may grant relief under the "unreasonable application" clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case. The focus of the latter inquiry is on whether the state court's application of clearly established federal law is objectively unreasonable, and we stressed in Williams v. Taylor, 529 U.S. 362 (2002) that an

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Hill v. Johnson, 210 F.3d 481, 485 (5th Cir.2000).

44
28 U.S.C. § 2254(d)(1).

unreasonable application is different from an incorrect one.[45]

As to questions of fact, factual findings are presumed to be correct, and a federal court will give deference to the state court's decision unless it "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[46]

VII. LAW & ANALYSIS

1. *Sufficiency of the Evidence*

In Petitioner's first and second assignments of error, Petitioner alleges that the evidence adduced at trial was insufficient to support a conviction for first degree murder of a police officer for two reasons. Petitioner first argues that he was convicted despite proving, by a preponderance of the evidence, that he was insane at the time of the offense. He goes on to claim that no reasonable jury could have concluded that he had the requisite knowledge or intent to

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Bell v. Cone, 535 U.S. 685, 694 (2002), internal citations omitted.

46
28 U.S.C. § 2254(d)(2); see also Hill v. Johnson, 210 F.3d 481, 485; 28 U.S.C. § 2254(e)(1).

harm a police officer engaged in the lawful administration of his duty.

In regards to Petitioner's first claim for relief, that Petitioner sufficiently proved that he was not guilty by reason of insanity at the time of the offense, Petitioner asserts the same insufficiency arguments that he first raised on direct appeal in state court. Specifically, Petitioner claims that the jury acted unreasonably in finding him sane when six mental health experts testified at trial that he was insane at the time of the shooting, lay testimony corroborated their opinions, and the state presented no expert or lay testimony on the issue of Perez's sanity. The state claims that it vigorously rebutted the defense by demonstrating that the medical experts were mistaken as to Perez's mental condition at the time of the offense because they did not evaluate him evaluate him until significantly later; that the factual basis for the medical experts' testimony, derived primarily from later self-serving interviews with Perez, his wife, and his son, was unreliable; and that Perez's actions before and after the shooting demonstrated he was not insane.

The Louisiana Fourth Circuit Court of Appeal considered Petitioner's arguments and found that the factual scenario forming the basis of "[a]ll of the physicians" was sufficiently called into doubt to

undermine the testimony of the experts.[47] In addition, the Fourth Circuit found that Petitioner's fears that people were following him or intended to harm him or his family may not have been delusions given Petitioner's son's statements to police officers that Petitioner had spurned drug dealers.[48] In fact, the Fourth Circuit's decision found all of Petitioner's behavior "consistent with a man fleeing rebuffed drug dealers."[49]

The Louisiana Supreme Court upheld the Fourth Circuit's decision without opinion. Petitioner reiterated his insufficiency arguments in his application for post-conviction relief. Although Petitioner was granted an evidentiary hearing in response to his application, the hearing judge rejected Petitioner's arguments, refused to hear further expert testimony regarding Petitioner's sanity, and refused to overturn the jury in their

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47
State v. Perez, 98-KA-1407, November 3, 1999, p. 31. Specifically, the Fourth Circuit held that: All of the physicians who testified that Perez did not know right from wrong based their opinions, in significant part, on information obtained from Perez's wife and son concerning his behavior prior to the shooting of Officer McCormick.

48
Id.

49
Id., at 32.

verdict.[50] The Louisiana Supreme Court summarily upheld the hearing judge's decision and denied Petitioner's application for post-conviction relief on July 2, 2004.[51] Having reviewed the record and relevant law, this Court finds that the state court's denial of relief on this claim was an unreasonable application of clearly established Supreme Court precedent as Petitioner sufficiently proved that he was insane at the time of the offense such that no reasonable jury could have found otherwise.

A claim of insufficiency of the evidence is a mixed question of law and fact, requiring this Court to examine whether the state court's denial of relief was contrary to or an unreasonable application of United States Supreme Court precedent.[52] The Supreme Court established the due process standard a reviewing court must utilize in analyzing the

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State Rec. Vol. VI, Transcript of Post Conviction Hearing, State v. Perez, No. 385-086, January 28, 2003, pgs. 28, 40-42, 45.

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State v. Perez, 877 So.2d 141, 2003-2814 (La.7/2/2004).

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Penry v. Johnson, 215 F.3d 504, 507 (5th Cir.2000); Maes v. Thomas, 46 F.3d 979, 988 (10th Cir.1995).

sufficiency of the evidence in Jackson v. Virginia.[53] Pursuant to Jackson, the inquiry is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime, as identified by state substantive law, to have been proven beyond a reasonable doubt.[54]

In regards to Petitioner's first claim of insufficient evidence, Louisiana law presumes the sanity of the defendant, placing the burden on the defendant to overcome this presumption with proof of insanity by a preponderance of the evidence.[55] A defendant is not, however, required to establish insanity beyond a reasonable doubt.[56] To be exempted from criminal responsibility on the basis of insanity, a defendant must persuade the jury that he

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Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). See also Guzman v. Lensing, 934 F.2d 80, 82 (5th Cir.1991).

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Jackson v. Virginia, 443 U.S. at 316-17, 99 S.Ct. at 2787-88, 61 L.Ed.2d 560 (1979); Donahue v. Cain, 231 F.2d 1000, 1004 (5th Cir.2000).

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La.Rev.Stat.ann 15:432.

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State v. Stewart, 117 So.2d 583 (La.1960).

had a mental disease or defect which rendered him incapable of distinguishing right from wrong at the time of the incident.[57] Applying the Jackson standard to the insanity defense under Louisiana law, the inquiry for a reviewing court is whether any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could conclude beyond a reasonable doubt that the defendant failed to prove by a preponderance of the evidence that he was insane at the time of the offense.[58] Under Jackson, a review of the sufficiency of the evidence does not include a review of the credibility of the witnesses.[59] Instead, Jackson "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in testimony, to weigh the evidence and to draw reasonable inferences from basic facts to ultimate facts."[60] A jury's findings on

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La.Rev.Stat. 14:14.

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See Donahue v. Cain, 231 F.3d 1000, 1004 (5th Cir.2000); State v. Silman, 663 So.2d 27, 32 (La.1995); State v. Peters, 643 So.2d 1222, 1225 (La.1994); State v. Nealy, 450 So.2d 634, 637 (La.1984).

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Schlup v. Delo, 513 U.S. 298, 330 (1995); United States v. Garcia, 995 F.2d 556, 561 (5th Cir.1993).

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Jackson, 443 U.S. at 319 (emphasis added).

an issue of fact will be upset only where necessary to preserve the "fundamental protection of due process of law."[61]

When an accused offers expert testimony on the issue of sanity and the state does not, such testimony might suffice to render a jury's determination of guilt unreasonable, but due process does not inherently necessitate such a finding. There is "nothing essentially sacred or untouchable in expert testimony" and it is well-established that the state is not required to call expert witnesses to rebut the conclusions of a defendant's expert.[62] "Expert testimony, particularly that of psychiatrists, may be rebutted by the personal opinions of laymen."[63] Nevertheless, "the opinions of experts may not be

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Id., at 319; State v. Milton, 2006 WL 2776247, 1 (La.App. 3 Cir.2006).

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Dusky v. United States, 295 F.2d 743, 757 (8th Cir.1961); Brock v. United States, 387 F.2d 254, 257 (5th Cir.1967); Mims v. United States, 375 F.2d 135, 140-43 (5th Cir.1967); Breland v.. United States, 372 F.2d 629 (5th Cir.1967); Birdsell v. United States, 346 F.2d 775 (5th Cir.1965); United States v. Cain, 298 F.2d 934 (7th Cir.1962); State v. Parker, 416 So.2d 545 (La.1982); State v. Ledet, 692 So.2d 1309 (La.App. 3d Cir.1997).

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Brock v. United States, 387 F.2d 254, 257 (5th Cir.1967).

arbitrarily ignored," and there generally must exist some reason that is objectively present for ignoring expert opinion.[64] Previous case law indicates that expert testimony may, for instance, be overcome in the following ways: [B]y showing the incorrectness or inadequacy of the factual assumptions on which the opinion is based, 'the reasoning by which he progresses from his material to his conclusion,' the interest or bias of the expert, inconsistencies or contradictions in his testimony as to material matters, material variations between the experts themselves, and defendant's lack of co-operation with the expert ... In some cases, the cross examination of the expert may be such as to justify the trier of facts in not being convinced by him.[65]

The determination of whether expert testimony sufficiently overcomes contrary lay testimony depends, of course, on the particular facts

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Brock, 387 F.2d at 247 (5 th Cir.1967); United States v. Fortune, 513 F.2d 883, 890 (5 th Cir.1967), cert. denied, 423 U.S. 1020, 96 S.Ct. 459, 46 L.Ed.2d 393 (1975); United States v. McCracken, 488 F.2d 406, 412 (5 th Cir.1974); United States v. Harper, 450 F.2d 1032, 1037 (5th Cir.1971); Mims v. United States, 375 F.2d 135, 140-43 (5th Cir.1967); State v. Peters, 643 So.2d 1222, (La.1994).

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Mims v. United States, 375 F.2d 135, 143-44 (5th Cir.1967).

of the case.[66] A careful review of the record in the instant case, however, reveals no objective reason for the jury to have entirely disregarded the opinion of Petitioner's seven experts. The state in no way impinged upon the veracity, motives, or qualifications of any expert and there was nothing intrinsically unreliable about the experts' findings. Looking first at the qualifications of Petitioner's experts, it is evident that they were qualified beyond dispute.[67] Many of the experts were also disinterested as they were either appointed by the

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White v. Estelle, 669 F.2d 973, 978 (5th Cir.1982)(citing United States v. Mota, 598 F.2d 995 (5th Cir.1979), cert. denied, 444 U.S. 1084, 100 S.Ct. 1042, 62 L.Ed.2d 770 (1979)).

67
The state stipulated to the expertise of all of the psychiatrists who testified for Petitioner. Moreover, some of the experts appear to have been eminently qualified. Dr. Kronberger, for instance, was awarded a diplomat in clinical psychology and established that he had extensive experience with severally mentally ill patients. Rec. Vol. V, Trial Transcript, p. 263. Dr. Ritter's impressive credentials were previously recognized by the Louisiana Supreme Court, which found error when a court "disregarded the testimony of Dr. Ritter, a well respected forensic psychiatrist ... [who] has practiced forensic psychiatry in the New Orleans area since 1981 and is recognized in the state of Louisiana and neighboring states as an accomplished expert in this field." State v. Silman, 663 So.2d 27, 36, 95-0154 (La.11/27/95).

court or otherwise employed by the state.[68] While the interests and qualifications of experts are not decisive in the context of a sufficiency of the evidence claim, they are important factors in determining whether the jury was acting reasonably in disregarding expert testimony.[69]

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Dr. Ritter, Dr. Salcedo, and Dr. DeLand were appointed by the trial court to determine Petitioner's sanity. Rec. Vol. V, Trial Transcript, pgs. 137, 156, 230. Dr. Pena became involved in the case only after a state doctor contacted him for a consultation. Id., at 183. Dr. Carrington was employed by the state of Louisiana as a psychiatrist and was charged with diagnosing and restoring Petitioner to competency. Id., at 213-14.

69
In Wright v. United States, 250 F.2d 4 (D.C.Cir.1957), and Bishop v. United States, 394 F.2d 500 (5th Cir.1968) he testimony of disinterested experts specifically appointed or employed by the state carried substantial weight against lay witness testimony and the state's attempts to undermine the experts' testimony merely through cross-examination. Similarly, in Douglas v. U.S., 239 F.2d 52, 59 (D.C.Cir.1956) the court indicated that a rational jury may not disregard the expert testimony of three disinterested psychiatrists when there is no opposing medical evidence, and the non-expert testimony arguably "cut both ways, at least as deeply in the direction of insanity as sanity." See also Fielding, 251 F.2d 881; State v. Charles, 643 So.2d 1222 (La.1994) (finding defendant sufficiently established his insanity where both members of the sanity commission supported his claim, he was on medication for a long period of time before being restored to competency, and the state presented no expert testimony to

Appendix B

Beyond being highly-qualified and disinterested, Petitioner's experts were largely in agreement about Petitioner's condition and his sanity at the time of the incident. Although the precise diagnosis offered by some of the experts differed slightly as some characterized Petitioner as schizophrenic while others stated that he was delusional, all of them described Petitioner as exhibiting the same basic symptoms, all of them indicated that he suffered from a persecutory psychotic disorder-identified as the umbrella diagnosis encompassing schizophrenia and delusional disorders by Dr. Kronberger-and all of them indicated that his disorder affected his ability to understand the implications of his actions.[70] In order for expert evidence to be disregarded as conflicting, the discrepancies and variations between

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rebut his claim).

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Rec. Vol. V, Trial Transcript, pgs. 267 (Dr. Kronberger's diagnosis was delusional disorder persecutory type); Id., at 230 (Dr. Deland's diagnosis was psychotic disorder similar to schizophrenia which is characterized by paranoia and delusions); Id. 137-38 (Dr. Ritter's diagnosis was chronic paranoid schizophrenia characterized by disorganized thinking and persecutorial delusions); Id., at 197 (Dr. Urrutia's diagnosis was delusional disorder, persecutory type with disorganized thinking); Id., at 217-20 (Dr. Carrington indicated that Petitioner suffered from psychotic-type disorder which involved very disorganized thinking and that he responded well to the anti-psychotic medicine Haldol).

the experts' conclusions must be material.[71] As indicated by Petitioner's experts, the fact that one expert characterized Petitioner as schizophrenic and another as delusional, is not a material discrepancy in a case such as this one.[72] Dr. Kronberger noted, for instance, that Petitioner's psychotic disorder fell "under the umbrella of schizophrenia and other psychotic disorders"[73] and Dr. Urrutia explained that Petitioner's doctors were "on the same track" despite having slightly differing opinions.[74] Thus, the differing diagnoses are not sufficiently material to overshadow the clear consensus that Petitioner was insane and incapable of differentiating between right and wrong at the time of the incident.

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Bishop, 394 F.2d 500, 501 (5th Cir.1968) (citing Mims v. United States, 375 F.2d 135, 144 (5th Cir.1967)).

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See Satterwhite v. United States, 267 F.2d 675 (D.C.Cir.1959) (finding a diagnosis of schizophrenic reaction of the paranoid type versus a diagnosis of emotionally unstable personality disorder insufficiently relevant in the absence of government evidence indicating sanity or establishing significance of difference).

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Rec. Vol. V, Trial Transcript, p. 267.

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Id., at 204-05.

Appendix B

As to any incompatibilities within an expert's report, Dr. Salcedo and Dr. DeLand were the only experts whose reports contained potential discrepancies related to Petitioner's diagnosis. Dr. Salcedo and Dr. DeLand were appointed to determine Petitioner's competency, and finding Petitioner unresponsive and vague, they initially concluded that he was competent and probably malingering. His competency continued to be at issue, and upon further examination, they determined that Petitioner's initial lack of cooperation was, in fact, endemic of a paranoid condition.[75] Dr. DeLand indicated, for instance, that

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Dr. DeLand, for instance, stated that she initially believed he was competent because "he gave minimal answers to questions and answered "I don't know" and "I don't remember" to a lot of questions ... And he did not talk a whole lot." Dr. Salcedo likewise stated that his first impression was that Petitioner was malingering because his initial responses were "guarded and vague." Rec. Vol. V, Trial Transcript, pgs. 231, 159. As Dr. DeLand went on to say, however, Petitioner's behavior during the first meeting was, in fact, very consistent with his eventual diagnosis and that "[i]t's not unusual for very paranoid patients at the beginning, the first meeting with somebody, even a few meetings with them, to deny any of their paranoid delusions. Especially if they have beliefs that there's a conspiracy ... [s]o it's not unusual for people to not be very willing at first to open up about that because they're frightened." Dr. DeLand also indicated that his reluctance to answer could have been a reaction to the intimidating circumstances surrounding his initial evaluation. Id., at

doctors may have some initial difficulty diagnosing paranoid disorders, but that this does not mean that the person was malingering. Thus, while their opinion as to his sanity and competency changed after more thorough investigation, according to their testimony, an altered diagnosis in a case such as this is neither unexpected nor extraordinary. As such, the earlier incongruous reports do not undermine Dr. Salcedo and Dr. Deland's unequivocal ultimate determination that Petitioner was insane and not malingering.[76] More significantly, in the absence of evidence to the contrary or inconsistencies in any of the reports by the five other experts, the earlier reports by Dr. DeLand and Dr. Salcedo are not sufficiently "material" to justify the jury in disregarding the testimony of all seven mental health experts.

In addition to the state courts insufficient consideration of the qualifications of the experts, the record also does not substantiate the state court's conclusion that the testimony of Petitioner's experts was reasonably undermined by doubts about the factual basis upon which the experts based their diagnoses or by the existence of facts or circumstances demonstrating Petitioner's sanity. Looking first at the information forming the basis for

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Id., at 170, 232-33.

each expert's opinion, it is evident that even if the jury harbored doubts about the version of events espoused by Petitioner and his family, the jury would still not be justified in wholly disregarding the opinion of each and every expert who testified at Petitioner's trial. Several of the experts testified that they based their opinion on many sources of information and on their personal evaluation of Petitioner's behavior. For instance, Dr. Urrutia and Dr. Kronberger stated that they did not rely upon or have knowledge of other expert opinions prior to meeting Petitioner,[77] Dr. Salcedo, Dr. Urrutia, and Dr. Pena stated that they reviewed the entire record, including copies of the arrest report and witness testimony, in making their diagnosis,[78] and Dr. Kronberger made it clear that his evaluation of Petitioner's behavior and actions formed the primary basis of his diagnosis.[79] Lastly, all of the experts testified that they had specifically considered and

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Id., at 196, 266.

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Id., at 165, 190, 195.

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Dr. Kronberger specifically stated that his determination was based on Petitioner's "behavior in the here and now" and that the "details of the family, what they reported, they really just added a little bit of flavor to the whole thing." He also unequivocally indicated that the majority of his opinion came from his examination of Petitioner. Id., at 278, 280.

ruled out the possibility that Petitioner was faking his illness.[80] Given such testimony, it is evident that the reliability of all of the experts did not hinge on and, therefore, could not be impugned by simply undermining the veracity of Petitioner and his family.[81] This is especially true where, as here, the experts' credentials and interests remained untainted.

As to the notion that the expert opinion in this case was undermined by the state demonstrating a lack of knowledge of Petitioner's behavior on the part of the experts, this Court first notes that the record demonstrates that Petitioner's experts had

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Id., at 136, 142, 202 (Dr. Ritter); Id., at 161, 163 (Dr. Salcedo); Id., at 183 (Dr. Pena); Id., at 196 (Dr. Urrutia); Id., at 213-14, 217 (Dr. Carrington testifying that Petitioner was under constant supervision and that he met with Petitioner two times weekly for several months); Id., at 230 (Dr. DeLand); Id., at 264, 278, 280 (Dr. Kronberger stating that he "interviewed him exhaustively" and primarily based his diagnosis on his personal observations of Petitioner).

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See Bishop v United States, 394 F.2d 500 (5th Cir. 1968)(holding that the government failed to rebut Petitioner's evidence of insanity despite the defendant's questionable credibility, where the defendant presented expert testimony that did not depend on the truth of narrative statements made by the defendant and the government offered no contrary medical evidence).

knowledge of Petitioner's overall actions and that they found his behavior entirely consistent with someone suffering from paranoid delusions.[82] Even assuming that some of Petitioner's specific actions were not known by a particular expert, in order for an expert's opinion to be discredited on the basis of unknown facts, the facts in question must be "material."[83] There is no indication in the instant case that any unknown facts were "material" as knowledge of the unknown acts would not apparently have altered any expert's opinion.[84]

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Rec. Vol. V, Trial Transcript, pgs. 138, 140-41, 147 (Dr. Ritter); Id., at 201 (Dr. Urrutia); Id., at 218-220 (Dr. Carrington); Id., at 232 (Dr. DeLand); Id., at 270-71, 276-78 (Dr. Kronberger).

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See Bishop v. United States, 394 F.2d 500 (5th Cir. 1968)(holding that the government failed to rebut Petitioner's evidence of insanity despite showing a lack of knowledge by the experts of an utterance made by the defendant shortly after the incident, where defendant presented expert testimony that did not depend on the truth of narrative statements made by the defendant and the government offered no contrary medical evidence).

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The state's brief makes much of evidence indicating that Petitioner may have taken time to get provisions for the road trip, but several of Petitioner's experts stated that such that basic travel arrangements, such as getting a map, food, or gas would not have been uncharacteristic for someone suffering from delusions and that knowledge of such acts did not change

Finally, the record does not support the state court's conclusion that Petitioner's actions, known or unknown to the experts, sufficiently demonstrated that he was sane at the time of the incident in light of the overwhelming evidence establishing otherwise. As mentioned, expert testimony set out that Petitioner's actions, as described by witnesses in police and hospital records, were consistent with Petitioner suffering from paranoid delusions. In contrast to the testimony offered by Petitioner's experts, the state failed to present any evidence that Petitioner's actions were inconsistent with him being mentally ill or, alternatively, indicative of sanity. The state's witnesses did little more than document Petitioner's actions, which were ambiguous at best as to Petitioner's sanity at the time of the offense.[85]

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the opinion of the experts. Rec. Vol. V, p. 147 (Dr. Ritter); Id., at 173 (Dr. Salcedo); Id., at 191 (Dr. Pena); Id., at 198-202 (Dr. Urrutia). The state also argued that Petitioner leaving his son at the vehicle was inconsistent with his alleged delusional disorder. However, Dr. Salcedo and Dr. Kronberger indicated that Petitioner leaving his son at the vehicle was not inconsistent. Id., at 173. In addition, the state indicated that his encounter with Officer Polite explained his actions, but several of Petitioner's experts indicated that the encounter with Officer Polite was indicative of mental illness. Id., at 243-46, 780-81.

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Compare State v. Peters, 643 So.2d at 1226 (noting that the circumstances of a shooting itself were neutral on the issue of

Appendix B

A recitation by lay witnesses that a defendant was able to perform certain actions or that he seemed normal has previously been found insufficient in the face of expert testimony establishing otherwise.[86]

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sanity and, therefore, insufficient to rebut expert testimony establishing insanity despite Petitioner shooting only his estranged wife, lighting a cigarette, smiling and riding his bicycle away from the scene).

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United States v. Collier, 453 F.2d 1173 (5th Cir.1972)(finding testimony of ten lay witnesses insufficient to rebut the testimony of seven psychiatrists who concluded defendant was insane); Brock, 387 F.2d at 247 (5th Cir.1967)(noting that "there is less force to a statement that nothing abnormal was observed than to a clinically based assertion of insanity"); Wright v. United States, 250 F.2d 4, 10 (D.C.Cir.1957); Fielding v. United States, 251 F.2d 878 (D.C.Cir.1957); State v. Armstrong, 671 So.2d 307 (La.1996)(finding defendant presented overwhelming proof of insanity despite police officer and clerk of court testimony that defendant seemed normal and coherent); Peters, 643 So.2d at 1226. But see White v. Estelle, 669 F.2d 973 (5th Cir.1982); United States v. Andrew, 666 F.2d 915 (5th Cir.1982); United States v. Mota, 598 F.2d 995 (5th Cir.1979), cert. denied, 444 U.S. 1084, 100 S.Ct. 1042, 62 L.Ed.2d 770 (1979). While helpful reminders that lay witness testimony may adequately rebut expert testimony, White, Andrew, and Mota are readily distinguishable from the present case in that they involved fewer experts testifying on the defendant's behalf, the experts that did testify made substantial concessions during cross-examination, the government offered some expert testimony in two of the cases, and the lay witnesses had more exposure to the defendants.

This is especially so where the witness had only brief contact with the accused and/or limited experience dealing with mental illness.[87] As the Louisiana Supreme Court indicated in State v. Roy, for instance, a "defendant's flight from the scene of the killing and his submission to the police when his car stopped ... [were] not inconsistent with a state of insanity, and could not by any rational fact finder be said to overcome the overwhelming evidence of insanity."[88] Likewise, in United States v. Cooper, the Ninth Circuit found the government's evidence of sanity insufficient to rebut defendant's experts where the government's evidence consisted of testimony by lay witnesses that the defendant could talk intelligibly, was relaxed, could run, could perform movements involved in a robbery, appeared alert, and did not appear to be under the influence of drugs.[89]

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Wright v. United States, 250 F.2d 4, 10 (D.C.Cir.1957)(noting that "a statement that the witness never observed an abnormal act on the part of the accused is of value if, but only if, the witness had prolonged and intimate contact with the accused") (quoting Carter v. United States, 252 F.2d 608 (D.C.Cir.)); see also Fielding v. United States, 251 F.2d 878 (D. C.Cir.1957).

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State v. Roy, 395 So.2d 664, 669 (La.1981).

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465 F.2d 451 (9th Cir.1972).

There was some suggestion by the state as to a possible motive for Petitioner's actions, namely, that he was being pursued by rebuffed drug dealers and, after the fairgrounds encounter, was fearful of being prosecuted. Other than the Petitioner's own belief that he was being pursued by drug dealers and other persons, there is no evidence that rebuffed drug dealers were, in fact, pursuing Petitioner. Even assuming there was some validity to these speculative arguments, Petitioner's experts established that independent of whether someone was actually following him, they personally observed him and found him exhibiting psychotic behavior.[90] Finally, giving full credence to the notion that Petitioner was, in fact, being pursued by rebuffed drug dealers would still not render his actions objectively reasonable. The entire scenario-a family man with no violent criminal history, fleeing his home in Texas with one son while leaving behind his wife and other children, driving to an unknown city, refusing to stay in hotels despite having sufficient cash to do so, and eventually secreting himself to a

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Rec. Vol. V, Trial Transcript, p. 220 (Dr. Carrington)(noting that it would be extremely hard for someone to fake the disorganized thought processes Petitioner exhibited which typify a person suffering from a mental disease); p. 233 (Dr. DeLand)(indicating that it would be nearly impossible to perpetually fake symptoms while under 24/7 observation and that she specifically evaluated him based, in part, on his demeanor); pgs. 278, 280 (Dr. Kronberger).

shed on the premises of a private residence does not suddenly appear reasonable merely by assuming that a few drug dealers were pursuing Petitioner.

In the absence of a valid reason to disregard the testimony of Petitioner's experts, this Court finds that viewing the evidence in the light most favorable to the prosecution, no reasonable jury could have found that Petitioner failed to prove by a preponderance of the evidence that he was insane at the time of the offense. In reaching this decision, the Court is not unsympathetic to the difficult decision faced by the jury and the state courts in a case such as this, particularly given the undoubtedly emotional and potentially prejudicial circumstances surrounding Petitioner's trial and appeal. Indeed, as will be discussed later, had the trial taken place under less emotional circumstances, the jury may very well have reached a conclusion that was not "contrary to both medical testimony and visceral reaction."[91] As it stands, however, the jury's verdict flies in the face of overwhelming evidence that Petitioner was insane at the time of the incident, and, as the numerous cases cited herein demonstrate, it was an unreasonable application of the due process standard set out in Jackson for the state courts to have concluded otherwise.

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Brock v. United States, 387 F.2d 254, 258 (1967).

Appendix B

Turning to Petitioner's second claim of insufficient evidence, that no reasonable jury could find that Petitioner had the requisite intent or knowledge to harm a police officer, this Court finds it unnecessary to engage in an extended discussion of the merits of this argument. Although the Court cannot say that the jury was acting unreasonably in concluding that the lighting and setting afforded someone in Petitioner's location sufficient opportunity to see that he or she was being pursued by police officers, though there was testimony that it was otherwise,[92] the fact that Petitioner proved that he was delusional and incapable of distinguishing between right and wrong sufficiently negates any inference that he intended to harm a police officer or that he was aware that he was shooting at a police officer engaged in the lawful course of his duties.[93]

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Rec. Vol. V, Trial Transcript, pgs. 59-61, 66-67, 75-76, 98, 111-113.

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The Court would also note that Petitioner's situation is not wholly unlike that of the defendant in Donahue v. Cain, 231 F.3d 1000 (5th Cir.2000). In Donahue, the Fifth Circuit found that there was insufficient evidence to support a rational trier of fact in finding specific intent to harm a police officer where the officer's testimony established that the defendant was unable to see the officer's badge, the officer did not identify himself as an officer, the officer approached the scene in an unmarked vehicle, and the defendant did not attempt to harm the officer once the officer's status was established.

Thus, having determined that no reasonable jury could find that Petitioner had failed to prove by a preponderance of the evidence that he was insane at the time of the incident, this Court has necessarily found that no reasonable jury could find that Petitioner had the requisite knowledge or intent to kill a police officer.

2. *Brady Violations*

In his second assignment of error, Petitioner argues that the state violated Brady v. Maryland when it failed to disclose, prior to trial, (1) certain statements Petitioner's wife and son made to investigating officers shortly after the shooting and (2) a police report containing a statement attributed to Dr. Black prior to the shooting that Petitioner "look[ed] to be crazy." In response, the state asserts that the transcript containing Petitioner's statements was, in fact, made available to defense counsel in sufficient time to be of use to Petitioner and that the statement contained in the police reportwas not exculpatory or material.[94] Petitioner's arguments were considered and denied following an evidentiary hearing on Petitioner's application for

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At the evidentiary hearing for post-conviction relief and again in its response to the habeas petition (Fed.Rec.Vol.V, p. 26) the state cites to page 244 for Mrs. Perez and page 256 for Salvador Perez, Jr. as evidence that the defense was provided copies of their statements.

post-conviction relief. The hearing judge found evidence in the record indicating that defense counsel had the transcript and was able to utilize the transcript containing statements by Petitioner's wife and son, such that there was no Brady violation. The judge further found that the statement that Petitioner "look[ed] to be crazy" was not exculpatory and therefore not subject to Brady requirements. The Court finds no Brady violation with respect to the statements by the Petitioner's wife and son, but does find a violation as to the statement of Dr. Black.

Because a Brady claim presents a mixed question of law and fact, this Court must defer to state court decisions denying relief unless such decisions are "contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." [95] Pursuant to Brady, the state is required to furnish a defendant with evidence "materially favorable to the accused."[96] According to the Supreme Court, the Brady duty applies to impeachment evidence, exculpatory evidence, and even evidence "known only to police

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28 U.S.C. 2254(d)(1); Trevino v. Johnson, 168 F.3d 173, 184 (5th Cir.1999).

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Youngblood v. West Virginia, 126 S.Ct. 2188, 2190 (2006) (citing Brady v. Maryland, 373 U.S. 83, 87 (1963)).

investigators and not to the prosecutor" where that evidence is favorable to the accused and material to either guilt or punishment.[97] Thus, to succeed on a Brady claim, a defendant "must show that (1) the state withheld evidence, (2) the evidence was favorable to the accused, and (3) the evidence is material to guilt or punishment."[98] Evidence is considered material for the purposes of a Brady claim "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[99] This standard does not "require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal ."[100] Instead, reversal is proper

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Kyles v. Whitley, 514 U.S. 419, 438, 115 S.Ct. 1555, 131 L . Ed.2d 490 (1995); United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); Brady v. Maryland, 373 U.S. 83, 87 (1963); see also United States v. Agurs, 427 U.S. 97 (1976).

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DiLosa v. Cain, 279 F.3d 259, 262-63 (5th Cir.2002).

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Strickler v. Greene, 527 U.S. 263, 280 (1999) (quoting Bagley, 473 U.S. at 682, 105 S.Ct. 3375)).

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Youngblood, 126 S.Ct. at 2190 (quoting Kyles, 514 U.S. at 434, 115 S.Ct. 1555).

where a defendant has made a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[101] When multiple pieces of evidence are at issue, evidence that the government failed to disclose to the defendant should be considered collectively, not item-by-item, in determining whether the materiality requirement of Brady was violated.[102]

The disputed statements made by Petitioner's wife and son came from tape recorded statements taken by the Homicide Department on July 18, 1996, the day after the shooting. In the course of the conversation with the police, Petitioner's wife and son indicated that Petitioner had been exhibiting symptoms of paranoid delusions prior to his flight from Texas.[103] Inasmuch as these statements

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Id.

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Kyles, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.ed 490; Spence v. Johnson, 80 F.3d 989 (5th Cir.1996), cert. denied, 117 S.Ct. 519, 136 L.Ed.2d 407 (U.S.1996).

103
Rec. Vol. 6, Petitioner's Application for Post-Conviction Relief and accompanying Memorandum asserts that the following statements, made by Petitioner's wife during the July 18, 1996 phone call with Homicide detectives, were withheld in violation of Brady: Q: Did you receive a phone call from your

husband at any time, er ... in the last three days? A: Only on Monday the 15th ...Q: And can you tell me er ... what your husband told you in this phone conversation? A: He said ... er we are being ... we were being followed ... they are trying to kill us ... er ... he said don't ... he said er ... I'm not coming back until ... until they calm down ... tell them that I'm not coming back until they calm down. He said er ... I will be in contact with you....Q: Did he ... when he referred to THEY ... did he say who THEY were? A: No ... he didn't he just said, THEY, and they were in a small black car like a TransAm, or a Camaro or something like that ... but he ... he didn't say who ...

* * *

Q: Prior to this incident, did you have any threats, or do you know of any threats made upon him, yourself or your family...? A: No ... never ... but for the past ... for the past couple of days ... when he was mentioned ... he was starting to act kind of strange ... like ... like he knew something was going to happen ... but I didn't know what ... because I never heard ... or never heard him talk to anyone ... but he was like acting like ... saying, Those people are trying to get us out of here ... meaning out of our home ... out of our ranch ...

Q: Prior to this incident, did you have any threats, or do you know of any threats made upon him, yourself or your family ...? A: No ... never ... but for the past ... for the past couple of days ... when he was mentioned ... he was starting to act kind of strange ... like ... like he knew something was going to happen ... but I didn't know what ... because I never heard ... or never heard him talk to anyone ... but he was like acting like ... saying, Those people are trying to get us out of here ... meaning out of our home ... out of our ranch ...

* * *

Q: Let's ... let's ... just start over again ... er start from the

corroborate the testimony of Petitioner's wife and son and directly refute the state's primary theory of the case, that Petitioner and his family made up or greatly exaggerated symptoms of Petitioner's illness after the shooting, these statements are undoubtedly within the purview of Brady and, therefore, should have been made available to Petitioner. The primary issue in dispute in relation to these particular statements is whether the state actually withheld the evidence from defense counsel by failing to timely disclose the statements to Petitioner.

The Supreme Court has not explicitly decided if Brady material must be disclosed prior to trial, though many courts ascribe to the view that Brady does not require pretrial disclosure as long as the disclosure was not made so late as to prevent the defense from using the material effectively in preparing or presenting its case.[104] The state judge

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beginning like you had just started ... about leaving ... and why you left. A: My step-grandfather's friends ... they er ... my Mom and Dad think that they sell drugs ... and ... and I think that they asked my father if he wanted to be in drug making business ... or something ... and my father said, no ...

104
Leka v. Portuondo, 257 F.3d 89 (2d Cir.2001); United States v. O'Keefe, 128 F.3d 885 (5th Cir.1997); United States v. Bailey, 123 F.3d 1381 (11th Cir.1997); United States v. Woodley, 9 F.3d 774 (9th Cir.1993); United States v. Osorio, 929 F.2d 753 (1st Cir.1991); Nassar v. Sissel, 792 F.2d 119 (8th Cir.1986). But see United States v. Behrens, 689 F.2d 154, 158 (10th

considered Petitioner's arguments at the post-conviction hearing and found that the state must have furnished defense counsel with the transcripts because defense counsel was clearly aware that Petitioner's wife and son had been interviewed, defense counsel seemed to have knowledge of the substance of what Petitioner's wife and son told the investigating officers, defense counsel did not lodge any objections about not having been timely provided with the statements, and the prosecuting attorney indicated that he remembered providing Petitioner with the necessary transcripts either before or during the trial.[105]

While this Court is unable to ascertain from the record when the statements were furnished to Petitioner's trial attorney, they were apparently provided to the defense at least during trial.[106] The statements were, for instance, used on direct and cross-examination and again on redirect examination during the trial. In addition, even assuming that the defense was furnished with the statements after the trial began, there is no evidence

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Cir.1982) (finding that the relevant standard of materiality does not focus on trial preparation).

105
Rec. Vol. VI, State Post-Conviction Hearing, pgs. 55, 72.

106
Rec. Vol. V, Trial Transcript, pgs. 244, 256.

that Petitioner's trial counsel was incapable of adequately using the transcripts. The record, in fact, indicates that defense counsel utilized the transcripts when questioning witnesses. Thus, even assuming Petitioner's counsel did not receive the evidence before trial, Petitioner has failed to show actual prejudice beyond his trial counsel's own failure to adequately use the transcripts. Lastly, regardless of when Petitioner's counsel actually received the statements and as indicated by the state court judge, Petitioner's counsel knew that the wife and son had spoken with investigating officers after the shooting and had ample opportunity to investigate the substance of the statements by asking about them during an interview with Petitioner's wife and son. Generally, prosecutors do not have a duty under Brady to disclose information to defense counsel if defense counsel has knowledge of the information, or if defense counsel could have obtained such information with reasonable diligence.[107] Based on the current record, it cannot be

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Parr v. Quarterman, 472 F.3d 245, 254 (5th Cir.2006); United States v. Prior, 546 F.2d 1254, 1259 (5th Cir.1977) (holding that "[t]he government is not obliged under Brady to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself"); United States v. Barham, 595 F.2d 231 (5th Cir.1979) (refusing to find a Brady violation where defense counsel was aware of the substance of allegedly exculpatory prior statements given by certain witnesses and was offered the opportunity by the court

said that the state judge's determination that Petitioner's trial attorney was adequately furnished with or had sufficient knowledge of the statements was contrary to or a misapplication of clearly established federal law.

As to the police statement containing Officer Jackson's statement that Dr. Black told him that Petitioner "look[ed] to be crazy" prior to the shooting, the record does not reflect that Petitioner's trial counsel was either in possession of the report or timely furnished with it during Petitioner's trial. Moreover, the prosecuting attorney indicated that he had no recollection that the report was furnished to Petitioner, and the judge at the evidentiary hearing found no evidence that the statement was disclosed. The state court judge at the evidentiary hearing ultimately determined that the statement was not exculpatory.[108] The state argues that the evidentiary hearing decision was correct and that it is not reasonable to assume that this allegedly exculpatory evidence would have influenced the outcome since the testimony of several expert witnesses failed to do so. This Court disagrees and finds the statement extremely useful for both exculpatory and

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to subpoena those persons and question outside the presence of jury).

108
Rec. Vol. VI, Transcript of Post Conviction Hearing, State v. Perez, No. 385-086, January 28, 2003, p. 72.

impeachment purposes in addition to being "material" under Brady.

The primary issue at trial was Petitioner's sanity at the time of the incident with the state's evidence of sanity largely resting on eyewitness testimony that Petitioner acted and appeared normal. A statement by one of the state's witnesses indicating that Petitioner appeared "crazy" only moments before the shooting would, therefore, corroborate Petitioner's claim, undermine the state's case, and greatly benefit Petitioner. As mentioned, the statement could also have been useful for impeachment purposes. Specifically, it could have been used to impeach Officer Jackson's testimony wherein Officer Jackson stated that Dr. Black did not say anything to him when he led him to the back stairs. It likewise could have been used against Dr. Black who testified that he only said "this is dangerous."

Beyond being both exculpatory and impeachment evidence, the statement is clearly "material" under Brady. "Materiality" is frequently determined by weighing factors such as the importance of the witness, the significance of the evidence, and the strength of the prosecution's case.[109] Out of these factors, the strength of the

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109
United States v. Sipe, 388 F.3d 471 (5th Cir.2004).

prosecution's case is frequently the most important factor.[110] When the government's case is tenuous or filled with gaps, weaknesses, and uncertainties, the suppressed evidence is more likely to be found material.[111] In this case, the suppressed statement impacted the testimony of two key prosecution witnesses, Dr. Black and Officer Jackson, both of whom were present at the time of the incident.[112] In addition, the statement directly implicated the primary issue in dispute in the case, namely, Petitioner's sanity at the time of the shooting, and did so in a significant manner. A lay opinion that someone "look[ed] to be crazy" necessarily means that the observed conduct or demeanor was so

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110
Id., at 478 (noting that "[t]he materiality of Brady material depends almost entirely on the value of the evidence relative to the other evidence mustered by the state")(quoting Smith v. Black, 904 F.2d 950, 967 (5th Cir.1990), vacated on other grounds, 503 U.S. 930, 112 S.Ct. 1463, 117 L.Ed.2d 609 (1992)).

111
Monroe v. Angelone, 323 F.3d 286, 312 (4th Cir.2003); United States v. Sheehan, 442 F.Supp. 1003 (D.Mass.1977); State v. Falkins, 356 So.2d 415 (La.1978).

112
See Youngblood, 126 S.Ct. 2188 (finding suppression of a note by a state trooper indicating that testimony that defendant sexually assaulted victim was false and that the encounter was consensual a violation of Brady).

strikingly bizarre or disturbing as to be noticeable by the average person. This is strong evidence consistent with the opinions of all the experts and is especially important when uttered by one of only a few people present at the time of the shooting.[113] Finally, as discussed at length in the context of the sufficiency of the evidence claims, the state's case rebutting Petitioner's evidence of insanity was not strong. Not only did the state fail to offer any expert opinion indicating that Petitioner was sane at the time of the incident, but it also did not offer any observations by lay witnesses directly speaking to Petitioner's possible mental state at the time of the incident. Instead, the state's witnesses merely documented Petitioner's actions, which the state then inferred demonstrated sanity. Given the weakness of the state's case, the significance of a statement by a lay witness present at the scene corroborating Petitioner's experts, and the fact that the witness testified on behalf of the Prosecution, Dr. Black's statement that Petitioner "look[ed] to be crazy" could reasonably be expected to impact the

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113
Compare United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)(finding reversal of conviction required in situation where one of only two eyewitnesses told the prosecutor that the defendant was not the perpetrator).

state's case and lead a reasonable jury to a different conclusion.[114]

The state's argument that the statement was not "material" because "it is ludicrous to suggest that a comment from a person who had virtually no contact with petitioner would have influenced the jury ... [i]f the jury was unconvinced by six medical experts," does little more than underscore the unreasonableness of the jury and/or the prejudice of the trial setting. It certainly does not rebut the conclusion that the statement was suppressed, that it benefitted Petitioner's case, and that it was objectively "material" evidence which should have been disclosed. Here, the thrust of the state's rebuttal of the Petitioner's insanity defense was that it was concocted after the fact by the Petitioner and his family. Dr. Black's on the scene spontaneous observation that Petitioner appeared to be "crazy" just prior to the shooting directly refutes the state's position. For the state courts to have held this evidence not "material" was an unreasonable misapplication of Brady and its progeny.

114
Strickler v. Greene, 527 U.S. 263, 280 (1999)(quoting Baglev, 473 U.S. at 682, 105 S.Ct. 3375)).

3. *Improper remarks by trial judge and/or erroneous jury instructions.*

In his third assignment of error, Petitioner claims that the trial judge gave erroneous instructions and/or improperly commented on the evidence in regards to the element of specific intent.[115] The Louisiana Fourth Circuit Court of Appeal declined to address this assignment of error on direct appeal, "because Perez failed to object and preserve the issue for appellate review."[116] Citing

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115
Petitioner does not appear to take issue with the jury instructions as originally given by the trial court. Rather, Petitioner finds fault with the trial court's response to the jury's request for clarification of the specific intent requirement for first degree murder. Specifically, the jury sought clarification of whether Petitioner had to have knowledge that he was shooting a police officer. The trial judge indicated that the statute did not specifically say "knowledge" but that "maybe some inferences can be made about knowledge, about knowing, if you deal with all that you heard and deal with whether there was intent or not intent, or lack of intent." A juror then sought a definition of intent, to which the trial judge responded that "[y]ou have to really infer intent from the circumstances. And I think that you might have heard enough testimony and evidence that you can make inferences based on the circumstances surrounding the act." Rec. Vol. V, pgs.336-338.

116
Rec. Vol. V, Fourth Circuit Opinion, State v. Perez, 98-KA-1407, November 3, 1999, p. 36-37.

Appendix B

Louisiana Code of Criminal Procedure Article 801, the Court of Appeal found that a defendant "may not assign as error the giving or failure to give a jury charge or any portion thereof unless an objection thereto is made before the jury retires or within such time as the court may reasonably cure the alleged error."[117] In addition, the Court of Appeal cited Louisiana Code of Criminal Procedure Article 841(A), finding that a defendant "cannot avail himself of an alleged error unless he made a contemporaneous objection at the time of the error."[118]

A federal court will not "review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment."[119] For purposes of habeas

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117
Rec. Vol. V, Fourth Circuit Opinion, State v. Perez, 98-KA-1407, November 3, 1999, p. 36.

118
Rec. Vol. V, Fourth Circuit Opinion, State v. Perez, 98-KA-1407, November 3, 1999, p. 36.

119
Coleman v. Thompson, 501 U.S. 722, 729, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); Lott v. Hargett, 80 F.3d 161, 165 (5th Cir.1996); Amost v. Scott, 61 F.3d 333, 338 (5th Cir.1995), cert denied, 116 S.Ct. 557 (1995); Harris v. Reed, 489 U.S. 225, 262-63, 109 S.Ct. 1038, 1043 (1989).

review, a state court's decision is not sufficiently adequate or independent if it "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and ... the adequacy and independence of any possible state law ground is not clear from the face of the opinion."[120] Even if the procedural grounds upon which the state court opinion rests are sufficiently adequate and independent, if a habeas petitioner can demonstrate cause for his failure to comply with the state rule and prejudice resulting from the default or, alternatively, that a miscarriage of justice will occur if he is not granted relief, then a federal court may reach the merits of his claim.[121]

As indicated above, the Louisiana Court of Appeal's decision rested squarely on procedural provisions contained within the Louisiana Code of Criminal Procedure. Furthermore, the state court's decision is devoid of any reference that would indicate that the state court addressed Petitioner's claim on the merits or otherwise based its ruling on

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Id., at 733 (quoting Michigan v. Long, 463 U.S. 1032, 1040-41, 103 S.Ct.3469, 77 L.Ed.2d 1201 (1983)).

121
Sawyer v. Whitley, 505 U.S. 333, 339, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992); Miranda v. Leibach, 394 F.3d 984 (7 th Cir.2005), cert. denied, 125 S.Ct. 2947 (U.S.2005); Hughes v. Johnson, 191 F.3d 607, 614 (5th Cir.1999).

federal law. Thus, Petitioner fails to establish other than that the state law grounds are adequate and independent.

Evidently seeking exemption from the rule set out in Coleman, Petitioner asserts, as cause for his failure to satisfy Louisiana's contemporaneous objection requirement, ineffective assistance of trial counsel. The record does not substantiate that counsel was deficient in failing to object to the trial court's jury instructions. Moreover, Petitioner does not show prejudice from the procedural bar. Assuming that the trial court's response to the jury's inquiries was improper or insufficient, the record reflects that the trial court initially summarized the law regarding specific intent correctly. There is a presumption that the jury followed these instructions.[122] In addition, the trial judge stated, in admonishing the jury, "[i]f during the course of this trial, I have given you the impression that I have an opinion regarding any fact in this case, you are to disregard that impression. Likewise, if I have given you the impression that I have an opinion regarding the guilt or innocence of the defendant, you are to disregard that impression. That is an issue for you

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122
Weeks v. Angelone, 528 U.S. 225, 234, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000).

and you alone to decide."[123] An instruction may not be judged in isolation, but must be considered in the context of the instructions as a whole and the trial record.[124] Considering these comments in the context of the instructions as a whole, the Court finds that the judge's admonishment cured or rendered harmless any error potentially attributable to the allegedly improper comments. Thus, Petitioner has not demonstrated prejudice from his attorney's failure to contemporaneously object and the state court's later invocation of the procedural bar.

Finally, Petitioner does not raise, and the record does not support the notion that enforcing the procedural bar as to this claim would constitute a gross miscarriage of justice. While Petitioner's trial was marred by injustice in relation to other claims which require reversal of Petitioner's conviction, the alleged impropriety at issue here did not "so infect[ ]

123
Rec. Vol. V, Trial Transcript, p. 321.

124
Estelle v. McGuire, 502 U.S. 62, 71-72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); see also United States v. Frady, 456 U.S. 152, 169, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982) (indicating that the court should instructions. In addition, the trial judge stated, in admonishing the jury, "[i]f during the course of this trial, I have given you the impression that I have an evaluate jury instructions in the context of the overall charge to the jury as part of the entire trial process).

the entire trial that the resulting conviction violates due process."[125]

4. *Improper Prosecutorial Remarks; Failure to Admit Evidence*

Petitioner next argues that he was deprived due process when the prosecutor made an improper statement concerning written reports by Petitioner's experts and the trial court failed to declare a mistrial or, in the alternative, when the trial court refused to allow the jury to view the written reports. Petitioner raised a similar argument in his application for post-conviction relief, though he apparently put it in terms of prejudice caused by the trial court's failure to admit the written reports and thereby remedy the harm caused by the prosecutor's allegedly erroneous remark.[126] There is no evidence

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125
Estelle, 502 U.S. 62, 72 (1991) (finding that a petitioner must show that the ailing instruction by itself so infected the entire trial that the resulting conviction violated due process in order to obtain federal collateral relief for errors in the jury charge); see also Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)("[I]t must be established not merely that the instruction is undesirable, erroneous or even "universally condemned," but that it violated some [constitutional] right.").

126
Rec. Vol. VI, Application for Post-Conviction Relief, Perez v. Cain, No. 385-086, Section A.

that defense counsel contemporaneously objected to the allegedly improper remark and the trial judge at the evidentiary hearing did not specifically analyze this argument, though he did generally deny Petitioner's claims for relief.

"A criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone."[127] In determining whether reversal is justified in a particular case, the court must first determine if the prosecutor made an improper remark.[128] If the court finds that a prosecutor's remark was improper, the court then analyzes whether the remark "prejudiced the defendant's substantive rights."[129] In making that determination,

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127
United States v. Pando Franco, 503 F.3d 389, 2007 WL 2875969 (5th Cir.2007) (citing United States v. Lowenberg, 853 F .2d 295, 302 (5th Cir.1988)); United States v. Young, 470 U.S. 1, 11, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)(stating that "[i]nappropriate prosecutorial comments, standing alone," will not justify reversal of a conviction obtained in an otherwise fair proceeding).

128
United States v. Morganfield, 501 F.3d 453, 467 (5th Cir.2007)(citing United States v. Insaulgarat, 378 F.3d 456, 461 (5th Cir.2004), cert. denied, 543 U.S. 1013, 125 S.Ct. 637, 160 L.Ed .2d 480 (2004)).

129
Id. (quoting United States v. Munoz, 150 F.3d 401, 415 (5th

the court considers (1) the magnitude of the prejudicial effect of the statement; (2) efficacy of any cautionary instruction; and (3) the strength of the evidence of the defendant's guilt.[130] The determinative question, analyzed in the context of the trial as a whole, is "whether the prosecutor's remarks cast serious doubt on the correctness of the jury's verdict."[131]

The allegedly false statement at issue follows:

Doctors, doctors, doctors. You know, that's not the only time we talked to these doctors. We put him on the witness stand. We got transcripts after transcripts, and reports after reports. And they say something different here. They say something here. They say something different today. I'm going to give you one example and I'm not going to talk anymore about doctors. Dr. Pena. Dr. Pena seemed very intelligent. Remember Dr. Pena, a little short man? Very intelligent. A lot of degrees. Looks at people. He tells you that he can better assess whether somebody's telling the truth over a telephone than

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Cir.1998)).

130
Lowenberg, 853 F.2d at 302.

131
United States v. Guidry, 456 F.3d 493, 505 (5th Cir.2006); United States v. Freeman, 434 F.3d 369, 375 (5th Cir.2005).

he can talking to them face to face. He told you that right there. I'm going to read you something ... [proceeds to read the Sixth Amendment of the United States Constitution] ... Confront them. What do you think that's for? That's so you can look at their demeanor. If I told Judge Elloie I wanted to handle this trial over the telephone, he'd put me in Feliciana. That's all I got to say about doctors.[132]

Petitioner claims that this statement by the prosecutor was improperly prejudicial because it implied that the mental health reports submitted by the expert witnesses contradicted their testimony, when, in reality, the reports were consistent. Insofar as this would appear to be a reference to extrinsic evidence and imply that the Prosecutor has knowledge of facts not before the jury, it has the potential to be highly prejudicial.[133] It does not appear, however, that the prosecutor's statement was improper or sufficiently prejudicial in light of the context in which it was made.

Looking first at whether the statement was improper, the Court finds that the prosecutor's

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132
State Rec. Vol. V, Trial Transcript, pgs. 317-18.

133
Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935); see also Hurley v. Hodge, 426 F.3d 368 (6th Cir.2005).

statement, though confusing, is not without basis in the record. The prosecutor was apparently trying to point out inconsistent statements made by and/or between Petitioner's experts. It is not improper for a prosecutor to point out inconsistencies in witness testimony in closing statement so long as there is some basis in the record for their remarks.[134] In this case, the jury heard testimony to the effect that Dr. Salcedo and Dr. DeLand, both of whom admitted on the stand that they had initially filed reports indicating that Petitioner was malingering, changed their opinion regarding Petitioner's sanity. Thus, there is some basis for the prosecutor's statement that Petitioner's experts offered testimony contradicting their earlier reports. While the sole example of an inconsistent statement by an expert that the prosecutor cites is that of Dr. Pena, who did not offer testimony contradicting any of his earlier assertions, the fact remains that there was evidence given during trial establishing inconsistent reports by two of Petitioner's experts. In addition, while Dr. Pena's statement is not an example of a prior inconsistent statement, it is arguably at odds with assertions by Petitioner's other experts that it is important to interview people in person in order to determine if they are being honest. Thus, however

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134
Bates v. Bell, 402 F.3d 635 (6 th Cir.2005)("To be certain, prosecutors can argue the record, highlight the inconsistencies or inadequacies of the defense, and forcefully assert reasonable inferences from the evidence").

poorly worded the prosecutor's claim was, the overarching idea that Petitioner's experts were not wholly consistent is supported by the record and by the example cited by the prosecutor. As such, the prosecutor's comment does not appear to be improper.

Even assuming that the prosecutor's statement was improper, however, reversal would not be appropriate because the comment does not put the validity of the juror's verdict in serious doubt. To begin with, the confusing manner in which the statement was made detracts from its potential impact on the jury. Moreover, while the trial judge did not grant a mistrial, the trial judge specifically told the jury that closing statements are not evidence. Later, the trial judge indicated that the only information that the jurors should base the verdict on was evidence consisting of "the testimony of the witnesses and the exhibits which the Court [ ] permitted the parties to introduce."[135] While general, such instructions, especially when reiterated, have previously been found sufficient to offset any unfair prejudicial effect of the prosecutor's statements.[136] Finally, while the prosecution's case establishing Petitioner's sanity was insufficient, the prosecutor's

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135
Rec. Vol. V, p. 321.

136
United States v. Thompson, 482 F.3d 781, 786-87 (5th Cir.2007).

reference to an example that has little to do with the point the prosecutor claims to be making cannot be said to be particularly damaging to Petitioner's case. If anything, the prosecutor's confusing argument would seem to undermine the state's credibility more than Petitioner's.

With respect to state court evidentiary rulings, Petitioner is apparently referring to the trial court's refusal to permit counsel to publish the testifying medical experts' reports to the jury.[137] Petitioner asserts that this was error because the prosecutor's statements indicated that the experts' reports contradicted their testimony and that the Court either should have declared a mistrial or permitted the jury to review the expert's reports. First, as discussed, the prosecutor's statement was not sufficiently improper to have warranted a mistrial. As to the latter suggestion, assuming the judge's initial refusal to publish the reports to the jury was erroneous, a federal habeas court does not sit to review the correctness of such rulings.[138] " '[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law

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137
Rec. Vol. V, Trial Transcript, p. 281.

138
Guidry, 456 F.3d at 505 (quoting United States v. Palmer, 37 F.3d 1080, 1085 (5th Cir.1994)); Mercado v. Massey, 536 F.2d 107, 108 (5th Cir.1976).

questions.'"[139] Nor will the Court consider whether the jury should have been allowed to examine the reports after the prosecutor made the statement in closing argument as Louisiana law expressly prohibits the jurors from looking at expert reports during deliberation.

The Court finds that Petitioner has not established that he was prejudiced by the closing comments of the prosecution, when taken in the context of the trial as a whole. Thus, the Court finds nothing contrary to, or involving an unreasonable application of, clearly established Federal law in the state court's decision denying relief on this claim.

5. *Ineffective Assistance of Counsel.*

Petitioner claims that his trial counsel was ineffective for failing to object to highly prejudicial and unnecessary evidence, filing inapplicable pretrial motions, failing to properly examine Petitioner's expert witnesses, failing to obtain exculpatory evidence, failing to object to improper

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139
Trevino v. Johnson, 168 F.3d 173, 184 (5th Cir.1999), quoting Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); see also Molo v. Johnson, 207 F.3d 773, 776 n. 9 (5th Cir.2000)(holding "[f]ederal habeas review does not extend to state court conclusions of state law"); Hogue v. Johnson, 131 F.3d 466, 506 (5th Cir.1997) (noting that a disagreement as to state law is not cognizable on federal habeas).

jury instructions, and permitting a student practitioner to play a prominent role in the defense. Petitioner's claim with respect to the student practitioner was raised on direct appeal and in his application for post-conviction relief. In discussing the claim on direct appeal, the Louisiana Fourth Circuit Court of Appeal found that Mr. Jenkins sufficiently supervised Mr. Michaelson and that the record demonstrated that "Mr. Michaelson's performance was exemplary."[140] The rest of his ineffective assistance claims were raised in Petitioner's application for post-conviction relief. After receiving testimony and arguments on the issue at the evidentiary hearing, the judge denied the claim, finding no ineffective assistance of counsel in this case. In rejecting Petitioner's arguments, the judge stated that he personally witnessed the defense counsel's actions in pretrial hearings and at trial and would not second-guess their trial strategies. He further indicated that counsel cross-examined the state's witnesses and that he witnessed no counsel incompetence during the proceedings.[141] This Court disagrees and finds that defense counsel's failure to object to prejudicial

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Rec. Vol. V, Fourth Circuit Opinion, State v. Perez, 98-KA-1407, November 3, 1999, p. 24.

141
Rec. Vol. VI, Transcript, Post Conviction Hearing, State v. Perez, No. 385-086, Jan. 28, 2003, p. 40-42, 46.

evidence was deficient and prejudiced Petitioner's case.

A claim of ineffective assistance of counsel is a mixed question of law and fact.[142] Therefore, this Court must defer to the state court on these claims unless that decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

In Strickland v. Washington, the United States Supreme Court established a two-prong test for evaluating claims of ineffective assistance of counsel.[143] A petitioner seeking relief must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced his defense.[144] Petitioner bears the burden of proof when asserting a claim for ineffective assistance of counsel and "must demonstrate, by a preponderance of the evidence,

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142
Moore v. Cockrell, 313 F.3d 880, 881 (5th Cir.2002), cert. denied, 538 U.S. 969, 123 S.Ct. 1768 (2003).

143
Strickland v. Washington, 466 U.S. 668 (1984).

144
Id., at 697.

that his counsel was ineffective."[145] If a court finds that a petitioner has made an insufficient showing as to either of the two prongs of inquiry, i.e. deficient performance or actual prejudice, it may dispose of the claim without addressing the other prong.[146]

To prevail on the deficiency prong, a petitioner must demonstrate that counsel's conduct failed to meet the constitutional minimum guaranteed by the Sixth Amendment.[147] "Counsel's performance is deficient if it falls below an objective standard of reasonableness."[148] Analysis of counsel's performance must take into account the reasonableness of counsel's actions in light of all the circumstances.[149] As the Supreme Court explained, "[judicial scrutiny

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145
Jernigan v. Collins, 980 F.2d 292, 296 (5th Cir.1993); Clark v. Johnson, 227 F.3d 273, 284 (5th Cir.2000).

146
Strickland v. Washington, 466 U.S. 668, 697 (1984).

147
Styron v. Johnson, 262 F .3d 438, 450 (5th Cir.2001), cert. denied, 534 U.S. 1163 (2002).

148
Little v. Johnson, 162 F.3d 855, 860 (5th Cir.1998).

149
Strickland, 466 U.S. at 689.

of counsel's performance must be highly deferential" such that the reviewing court should make "every effort to ... eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct from counsel's perspective at the time."[150] There is, therefore, a strong presumption that the conduct of a defendant's counsel falls within a wide range of reasonable representation.[151] Despite this presumption, however, a petitioner may satisfy the deficient performance prong by showing that the representation at issue falls "outside the wide range of professionally competent assistance."[152] Thus,while the Strickland presumption is "highly demanding," it is "by no means insurmountable."[153] Moreover, "Strickland's 'in light of all circumstances' review does not preclude a finding of ineffective assistance where the alleged deficient actions or

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150
Id., at 689.

151
Crockett v. McCotter, 796 F.2d 787, 791 (5th Cir.1986); Mattheson v. King, 751 F.2d 1432, 1441 (5th Cir.1985).

152
Id., at 690.

153
Kimmelman v. Morrison, 477 U.S. 365, 382, 106 S.Ct. 2574, 2587, 91 L.Ed.2d 305, 323 (1986).

omission centers upon a single incident, if that error is sufficiently egregious and prejudicial."[154]

In order to prove prejudice from trial counsel, a petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[155] A reasonable probability is one "sufficient to undermine confidence in the outcome."[156] In making a determination as to whether prejudice occurred, courts must review the record to determine "the relative role that the alleged trial errors played in the total context of [the] trial."[157] In other words, a reviewing court "must consider the totality of the evidence before the judge or jury," which in turn means consideration of the quantity and quality of the evidence against the

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United States v. Cronic, 466 U.S. 648, 657 104 S.Ct. 2039, 2046 n. 20, 80 L.Ed.2d 657 (1984).

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Strickland, 466 U.S. at 694.

156
Id.

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Crockett, 796 F.2d at 793.

defendant.[158] "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."[159]

Petitioner first asserts that his trial counsel was ineffective for failing to object to prejudicial evidence and testimony. In particular, Petitioner claims that the following items were highly prejudicial and should have been objected to: (1) the testimony of Danine McCormick in the guilt phase regarding her marriage to the deceased officer; (2) the testimony of Dr. Myron Smith regarding injuries sustained by the police dog; (3) x-rays documenting the police dog's injuries; (4) the playing of the 911 call made by Officer Jackson after Officer McCormick was shot; and (5) the testimony of Dr. William Newman regarding the autopsy and his opinion of how long Officer McCormick might have survived after being shot. In addition, Petitioner asserts that his trial counsel was ineffective for failing to object to the state's hypothetical and speculative arguments.

At the outset, it bears mention that the record is replete with instances in which Petitioner's trial

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Strickland, 466 U.S. at 695.

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Id., at 696.

counsel performed reasonably. Counsel interviewed witnesses, retained or otherwise contacted several mental health experts who spoke on Petitioner's behalf at trial, raised valid objections throughout Petitioner's trial, and sought suppression of several items which were unduly prejudicial. Even when counsel provides adequate representation in some respects, however, counsel's conduct in others may be so deficient as to severely prejudice a defendant's case.[160] In determining whether counsel's failure to object was objectively unreasonable in this instance, the Court must first determine the circumstances surrounding Petitioner's trial and the extent to which the aforementioned items and testimony were prejudicial.

In this case, there was an appreciable potential for unfair prejudice. Trials involving slain

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See Rompilla v. Beard, 545 U.S. 374, 387, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) (finding trial counsel deficient when they failed to investigate a court file containing mitigating evidence even though they pursued other avenues of unearthing mitigating information, including interviewing the defendant and his family members and consulting mental-health experts); Dugas v. Coplan, 428 F.3d 317, 328 (1st Cir.2005) (holding that where defense counsel visually inspected the fire scene himself, talked with the state's experts, did some limited reading, and talked with other defense attorneys, he nonetheless failed to adequately investigate an available "no arson" defense).

police officers are understandably highly charged,[161] and there is evidence that this case was no exception.[162] Petitioner's status as an outsider, both to the area and to the country, did little to endear him to the jury; a situation that was probably not alleviated by his concession that he shot Officer McCormick and almost certainly worsened by the numerous police officers testifying against him and his reliance on a notoriously unpopular defense. In light of these circumstances, the admittance of any amount of unnecessary and prejudicial evidence would be particularly detrimental to Petitioner's

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161
E.g., Holbrook v. Flynn, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986); Woods v. Dugger, 923 F.2d 1454 (11th Cir.1991).

162
In pretrial hearings, for instance, the trial judge frequently highlights the need to adjudicate the matter quickly. In addition, two newspaper articles discussing Petitioner's trial, indicated that it was "high-profile" and emotional. One, for example, stated that "Jackson's testimony sent some relatives and friends of officer Chris McCormick from the courtroom in tears, while others stayed and wept." Pamela Coyle. staff writer, Partner Fell After 'Pop' Routine Call Led to Police Death, The New Orleans Times-Picayune, March 13, 1998, p. B 1. Petitioner's trial counsel, evidently recognizing the potential for prejudice, lodged some objections to prejudicial items and sought unsuccessfully to have uniformed police officers, other than those there for safety, excluded from the courtroom.

case, a fact of which prudent counsel would have been keenly aware.

Beyond the potentially prejudicial setting itself, the evidence in question appears to be of the type properly excluded as unfairly prejudicial, extraneous, or wasteful under Louisiana law. The Louisiana Code of Evidence requires that evidence be relevant to be admissible. Evidence is relevant if it has any tendency to show any fact of consequence to the determination of the outcome.[163] Even if evidence is relevant, however, it may still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.[164] When a defendant has made a stipulation in regard

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LSA-C.E.Art. 401: "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence; see also State v. Jones, App. 5 Cir.2002, 824 So.2d 514, 02-267 (La.App. 5 Cir. 7/30/02), writ denied 847 So.2d 1254 (La.2003) (explaining that relevant evidence in criminal case is that which tends to show commission of offense charged, and intent, or tends to negate commission and intent).

164
LSA-C.E.Art. 403: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time.

to certain facts, it is a factor to be considered in determining whether evidence is too prejudicial to be admitted.[165] Nevertheless, "the state cannot be robbed of the moral force of its case merely because the defense offers a stipulation."[166]

Looking first at the testimony of Danine McCormick, it is clear that it was offered solely for emotional value. Testimony by a victim's family member is generally permitted during the sentencing phase of trial, but less frequently so during the guilt phase because of its prejudicial tendencies.[167] It may be admissible in the guilt phase, however, to corroborate the state's theory, establish relevant behavior by the decedent, or other

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State v. London, 559 So.2d 510 (La.App.2d Cir.1990), writ denied, 565 So.2d 941 (La.1990).

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State v. London, 559 So.2d 510 (La.App.2d Cir.1990), writ denied, 565 So.2d 941 (La.1990).

167
Jones v. United States, 527 U.S. 373, 401-02, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999) (permitting victim impact evidence in the sentencing phase); Payne v. Tennessee, 501 U.S. 808, 823-27, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (indicating that such evidence is permissible at sentencing to counteract mitigation evidence).

similar purposes.[168] In the case sub judice, the widow's testimony was wholly unnecessary to proving the state's case, particularly given that there was no question as to who actually shot Officer McCormick. Reading over the widow's testimony reveals that she contributed no facts helpful to the state in proving its case. In fact, her testimony establishes only that she was married to Officer McCormick, where they were married, how long they were married, that they had five children, and the location where various family pictures were taken, including one in front of a memorial for slain police officers.[169] While the fact that Officer McCormick was married and had a family is relevant to a penalty phase, because of the emotional setting and because she offered virtually no facts helpful to the state in proving any of the elements of the crime charged, her testimony in the guilt phase had no probative value and was significantly prejudicial.

168
Jones v. United States, 527 U.S. 373, 401-02, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999) (permitting victim impact evidence in the sentencing phase); Payne v. Tennessee, 501 U.S. 808, 823-27, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (indicating that such evidence is permissible at sentencing to counteract mitigation evidence).

169
Rec. Vol. V, Trial Transcript, pgs.132-33.

Appendix B

Dr. Myron Smith's testimony and the x-rays of wounds sustained by Max the police dog, were also unnecessary for the state to establish that Petitioner shot Officer McCormick. While relevant as part of the events leading to Petitioner's capture and descriptive of Petitioner's behavior at the time of the

incident, since Petitioner admitted to shooting the dog and testimony by other Officers and even several of Petitioner's experts established that Petitioner shot the dog, such evidence was emotionally geared, cumulative, wasteful of the court's time, confusing and unfairly prejudicial.[170]

170
See, e.g., State v. Gay, 697 So.2d 642 (La.App. 2 Cir.1997) (finding that evidence that house where homicide occurred was known as "crack house" and that defendant went to house to buy drugs rather than to commit armed robbery which resulted in death was inadmissible since evidence about crack sales tended to confuse the issue of defendant's intent to kill with his motive for going to the house); State v. Cuccia, 933 So.2d 134 (La.App. 4 Cir.2006), writ denied, 939 So.2d 1273 (La.2006) (sustaining State's objection to defense counsel's question of detective on cross-examination as to whether he learned of victim's boyfriend's drunken rage at the hospital where victim was taken since such question would have been a waste of time, as the jury had already learned that boyfriend was allegedly in a "drunken rage" at the hospital and was asked to leave); State v. Kelly, Sup.2001, 791 So.2d 1286 (La.2001) (holding that probative value of other crimes evidence in the form of testimony from 15 non-victim witnesses was substantially outweighed by the danger of

Appendix B

The playing of the 911 phone call made by Officer Jackson was equally inflammatory, particularly when repeated during closing argument. While 911 phone calls are potentially admissible, they usually must establish some fairly significant fact in dispute or support a critical element of the state's case.[171] Officer Jackson testified that he radioed for help after seeing his partner shot, there

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unfair prejudice in prosecution for indecent exposure to juveniles as such testimony was cumulative to three other witnesses who were allowed to testify that defendant previously touched them inappropriately or engaged in lewd and lascivious conduct in their presence); State v. Tipton, 705 So.2d 1142 (La.App. 1 Cir.1997) (holding that defendant's half-sister's testimony and photographs regarding victim's alleged assaultive behavior toward half-sister at hospital were duplicitous of other record evidence of victim's assaultive behavior toward half-sister, and thus such repetitious evidence was inadmissible, and the failure to admit such evidence did not violate defendant's constitutional rights to due process and to present defense).

171
C.f. State v. Jones, 891 So.2d 760 (La.App. 4 Cir.2004), writ denied, 916 So.2d 140, 2005-0124 (La.2005) (permitting victim's phone call to 911 made during break-in as probative and necessary insofar as the state was required to show that defendant killed the victim during a burglary); State v. Hurst, 797 So.2d 75 (La.App. 1 Cir.2000), writ denied, 798 So.2d 962, (La.2001); State v. Sholes, 782 So.2d 691 (La.App. 4 Cir.2001), writ denied 810 So.2d 1136, (La.2002); State v. Derouselle, 769 So.2d 141 (La.App. 4 Cir.2000), writ denied, 799 So.2d 491, (La. 2001).

was no dispute surrounding his doing so, and there is no indication in the record that the tape contained any identification or other information helpful to the state's case. The tape was never referenced in terms of establishing a material element of the state's case or referred to at all absent the prosecutor's appeal to the jury for a verdict of guilty. Under these circumstances, while the tape was relevant, its probative value was exceedingly limited. It is obvious that the playing of the 911 tape served no purpose other than to appeal to the jury's emotions.

This is particularly true when examined in the context of the prosecution's closing argument, during which the prosecutor unambiguously appealed to emotion arguing "most of all, this is real" before playing the tape again. The prosecutor then followed the tape with the statement "[t]ell him it is real. Tell him it is wrong. Find him guilty."[172]

The only evidence cited by Petitioner that was probative and not objectively overly-prejudicial was the testimony offered by Dr. Newman regarding the

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172
Rec. Vol. V, Trial Transcript, p. 320. It is further worth noting that this is apparently the effect that the playing of the tape had, as a newspaper article stated that "some of McCormick's relatives wailed and wept" as the tape was playing during closing. Pamela Coyle, Staff Writer, Texas Man is Guilty of Cop's Murder, Conviction Draws Cheers in Courtroom, The New Orleans Times-Picayune, March 14, 1998, p. B1.

cause of Petitioner's death. As part of its case, the state had the right to establish that Petitioner died from one gunshot wound and had the right to present evidence regarding the circumstances surrounding that death.[173] Finally, in regards to the numerous hypotheticals the state asked Petitioner's experts about, the Court notes that such hypotheticals had the potential to confuse the jury.

Dr. Kronberger stated as much when, in responding to one of the prosecutor's hypothetical questions, he responded "[y]ou're asking me a very hypothetical question. So I don't know how it would help. I think it's just muddying the waters."[174] In addition, the record reflects that other experts seemed equally confused by what the prosecution

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State v. Gilmore, 332 So.2d 789, 796 (La.1976)(noting that the state is entitled to the "moral force of its evidence" even in some situations where the defendant has made significant stipulations); see also State v. Manieri, 378 So.2d 931 (La.1979).

174
This is similar to State v. Wilson, App. 3 Cir.1996, 677 So.2d 471, 1996-46 (La.App. 3 Cir. 5/8/96), writ denied 699 So.2d 49, 1996-1893 (La.8/27/97), in which the court found that exclusion was proper based on the likelihood of the hypotheticals to confuse the jury as evidenced by the physician stating that he could not answer the hypothetical without actually examining the patient.

was asking.[175] Having acknowledged that the hypotheticals could have confused the jury, however, the Court notes that Petitioner's trial counsel did object to some of the prosecution's questions as speculative and/or argumentative and cannot say that the failure to object to each an every hypothetical, even in the context of this trial, was deficient or objectively unreasonable.[176]

In light of the prejudicial circumstances surrounding the trial and the sheer volume of unfairly prejudicial, confusing, and unnecessary evidence offered by the state, trial counsel's cumulative failure to object to the aforementioned items was objectively unreasonable and constitutionally deficient.[177] This is true even in light

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Rec. Vol. V, Trial Transcript, p. 150 (Dr. Ritter); Id., at 191-92 (Dr. Pena).

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Id.

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Compare Hodge v. Hurley, 426 F.3d 368 (6th Cir.2005)(holding that trial counsel's failure to object to repeated instances of prosecutorial misconduct constituted ineffective assistance of counsel in violation of Strickland); Floyd v. Meachum, 907 F.2d 347 (2d Cir.1990)(finding the cumulative effects of state prosecutor's remarks in summation sufficient to so prejudice the trial as to warrant reversal); Wynters v. Poole, 464 F.Supp.2d 167 (WDNY 2006)(finding defense attorney's failure

of the many ways in which counsel performed sufficiently, including counsel's efforts in obtaining seven mental health experts. It is objectively unreasonable for counsel to presume that a fair trial can occur under circumstances riddled with prejudice, especially when counsel was aware of the likelihood and potential for prejudice, but nevertheless took insufficient actions to ensure that their client received a fair trial from an impartial jury.[178]

Having found that Petitioner's counsel acted deficiently in failing to object to prejudicial evidence, the Court must next determine whether counsel's deficient performance prejudiced Petitioner's case. In this regard it is helpful to remember that the question before the Court is not one of the sufficiency of the evidence. Rather, the question is whether counsel's failures undermine the Court's confidence in the reliability of the result. In this case, counsel's failures permitted the state to put on prejudicial evidence that served no purpose other than to appeal to the juror's emotions. This occurred in the context

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to object to prosecutor's cross-examination of the investigator who interrogated the defendant constitutionally deficient and ineffective).

178
Compare Wynters v. Poole, 464 F.Supp.2d 167, 180 (WDNY 2006)(indicating that trial counsel's awareness of the impropriety made the failure to object especially egregious).

of an already heated and emotionally charged trial. Counsel's strong insanity defense in the form of seven mental health experts was, therefore, seriously undermined by counsel's own failure to object and ensure Petitioner a fair trial from an impartial jury. As such, this Court finds that had Petitioner's counsel objected and prevented prejudicial circumstances from pervading Petitioner's trial it is reasonably likely that the jury would have reached a different conclusion.

Having determined that Petitioner's Sixth Amendment right to counsel was violated when he received ineffective assistance of counsel, the Court must lastly decide whether the state court's application of Strickland was unreasonable. The only state court to expressly consider the issue was the judge at the evidentiary hearing who, as the same judge that presided over the trial, indicated that he did not observe any deficiency. There was virtually no consideration or discussion of the cumulative effect such prejudicial evidence might have had in the context of the trial. In addition, the hearing judge engaged in no investigation of whether the evidence was, in fact, prejudicial. As the Supreme Court has recognized, a single deficiency can be sufficiently severe as to constitute ineffective assistance of counsel.[179] The state court's failure to

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United States v. Cronic, 466 U.S. 648, 657 104 S.Ct. 2039,

examine the alleged deficiencies and instead rely upon some instances of adequate representation was an unreasonable application of Strickland, especially since the hearing judge was apparently aware of the notoriety surrounding the case.

With respect to Petitioner's claims that his trial counsel was deficient in his pretrial conduct, that his counsel failed to properly examine Petitioner's expert witnesses, that counsel did not obtain exculpatory evidence or adequately introduce evidence favorable to the defense, that counsel failed to object to improper jury instructions and the state's improper closing statement, and that counsel improperly permitted a student practitioner to play a large role in Petitioner's defense, the Court finds these arguments without merit. First, insofar as the Court previously found that the jury instruction and the state's closing statement were not improper, it does not find counsel deficient for failing to object to them.

As to Petitioner's claim that counsel's pretrial conduct was deficient, Petitioner fails to establish or argue how counsel's actions prejudiced Petitioner. Petitioner asserts that counsel's pretrial conduct was unreasonable because counsel filed inapplicable

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2046 n. 20, 80 L.Ed.2d 657 (1984); Chatom v. White, 858 F.2d 1479, 1486 (11th Cir.1988).

motions containing material misstatements of fact.[180] While such obvious mistakes are arguably deficient and have the potential to undermine pre-trial motions, Petitioner neither identifies which motions would have been otherwise granted nor demonstrates that this resulted in the trial court actually discounting any of counsel's legitimate legal arguments. In the absence of such evidence or any explanation as to how these alleged pretrial deficiencies undermined Petitioner's case before the jury, the Court cannot say that Petitioner was prejudiced by trial counsel's extraneous filings.

Petitioner's assertion that his counsel improperly examined expert and/or lay witnesses is likewise without merit. Generally, the failure to fully utilize a witness is not found to fall below an objective standard of care so long as the witness was put to reasonable use.[181] In this case, the record only

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Two motions filed by Petitioner's trial counsel stated that "Defendant is black and poor, and accused of killing a white person," when Petitioner is, in fact, Hispanic and Officer McCormick was black.

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See Coble v. Quarterman, 496 F.3d 430, 438 (5th Cir.2007) (finding trial counsel was not ineffective for failing to adequately prepare witnesses before putting the expert on the stand and that although trial counsel could have been "more effective," their failure to do so does not necessarily mean they were ineffective); see also Emery v. Johnson, 139 F.3d 191, 197

reflects that Petitioner's counsel may have not fully utilized Dr. Kronberger.[182] It certainly does not establish that Petitioner's counsel improperly handled all of the experts. Even assuming Petitioner's counsel did not fully utilize any of the experts, counsel elicited sufficient information to persuade a reasonable jury that Petitioner was insane and to rebut the state's limited arguments. Counsel was, therefore, not deficient in its handling of the experts.

Finally, as to Petitioner's claim that a student attorney should not have been permitted to play a prominent role in his trial, the Court notes that the Louisiana Fourth Circuit and the judge at Petitioner's post-conviction evidentiary hearing both found that Mr. Michaelson performed sufficiently and was at all times under the supervision of Petitioner's primary defense counsel, Mr. Jenkins.

(5th Cir.1997) ("The Sixth Amendment does not guarantee criminal defendants the right to error-free representation.").

182
At the evidentiary hearing, appellate counsel had Dr. Kronberger testify that he had specifically prepared an outline of questions for trial based on his previous experience as an expert which Petitioner's counsel was given but failed to utilize. There is no evidence that any of the other experts prepared similar outlines and no specific contention that any of the other experts were similarly mishandled. Rec. Vol. VI, pgs. 16-26.

Moreover, Petitioner points to no specific instance where Mr. Michaelson's actions fell below an objective standard of reasonableness and cites no prejudice from his participation. Nor does the record reflect any such instances, save the same failure to object to prejudicial evidence attributable to Mr. Jenkins.

6. *Trial Court's Erroneous Admission of Prejudicial Evidence.*

Closely related to Petitioner's ineffective assistance of counsel claims, Petitioner argues that the trial court failed to keep out erroneous and prejudicial evidence. Because his trial counsel admitted that Petitioner shot Officer McCormick, Petitioner asserts that the admission of the following items was unnecessary and prejudicial: Mrs. McCormick's testimony, the autopsy photos, the officer's bloody shirt, the 911 tape, and the photographs of the officer's wedding and children. In addition, Petitioner claims that the trial court erred in denying defense counsel's objection to the presence of uniformed officers in the courtroom. In response, the state claims that this evidence was ruled admissible at trial, and that it was proper evidence because the state was required to prove its case beyond a reasonable doubt regardless of any stipulation in the defense's opening remarks about the shooting. The state also claims that admissibility of evidence is an issue of state criminal procedure rather than federal constitutional rights. These

arguments were raised in Petitioner's application for post-conviction relief and were denied by the evidentiary hearing judge without analysis.

It is well-established that "[e]rrors of state law, including evidentiary errors, are not cognizable in habeas corpus."[183] Even if evidence were improperly admitted, habeas relief for errors in a trial court's evidentiary ruling is warranted only if the admission of evidence was sufficiently arbitrary or prejudicial to result in a "denial of fundamental fairness" under the Due Process Clause.[184] Moreover, the erroneous admission of prejudicial evidence will justify habeas relief only if the admission was a crucial, highly significant factor in the defendant's conviction.[185] "Assuming arguendo that the admission of [evidence] was constitutional error, [the] claim still fails [if the defendant] has not shown that the testimony had a 'substantial and injurious

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Wood v. Quarterman, 503 F.3d 408 (5th Cir.2007) (quoting Derden v. McNeel, 978 F.2d 1453, 1458 (5th Cir.1992)).

184
Janecka v. Cockrell, 301 F.3d 316, 328-29 (5th Cir.2002) (quoting Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)); Neal v. Cain, 141 F.3d 207, 214 (5th Cir.1998); see also Little v. Johnson, 162 F.3d 855, 862 (5th Cir.1998).

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Id.

effect or influence in determining the jury's [ ] verdict."[186]

In this case, the admission of some of the above evidence was erroneous and, as discussed, prejudicial. This is not true for all of the evidence, however, as the autopsy photographs and victim's clothing were likely admissible.[187] Moreover, even in the instances in which the admitted evidence was prejudicial, Petitioner's trial counsel not only failed to object, but also stipulated to the admittance of Danine McCormick's testimony and the playing of the 911 tape-two of the most prejudicial pieces of evidence. While trial courts have an obligation to protect the integrity of the trial process, the judge was not on notice that there was or would be anything inherently improper about Danine

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Wood, 503 F.3d (citing Janecka, 301 F.3d at 328-29).

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Autopsy photographs are frequently admitted to corroborate evidence establishing cause of death, location, placement of wounds, etc. State v. Nix, 327 So.2d 301 (La.1975); State v. Lee, 569 So.2d 1038 (La.Ct.App.3d Cir.1990); State v. Condley, 904 So.2d 881 (La.Ct.App. 5th Cir.2005). Similarly, evidence such as the victim's clothing is usually admissible even if defense counsel is willing to stipulate to its existence and may be used to establish the extent of the injury. State v. Gilmore, 332 So.2d 789 (La.1976); State v. Sterling, 377 So.2d 58 (La.1979); State v. Manieri, 378 So.2d 931 (La.1979); State v. Deaton, 412 So.2d 586 (La.1982).

McCormick's testimony as both sides agreed to it. Likewise, in light of defense counsel's complacency with the playing of the 911 tape, the judge may have assumed that Petitioner's counsel failed to object as part of a general strategy. With every indication that defense counsel accounted for the prejudicial nature of the evidence and did not find it sufficiently worrisome to object, the Court cannot say that it was plain error for the trial judge to admit the unopposed testimony of Danine McCormick and 911 tape.

In regards to Petitioner's claim that the trial judge improperly refused to exclude several uniformed officers from the courtroom during the trial, this Court finds that this argument is likewise without merit. Due process requires courts to safeguard against "the intrusion of factors in the trial process that tend to subvert its purpose."[188] In particular, courts must guard against the atmosphere in and around the courtroom becoming so hostile as to interfere with the trial process.[189] The presence of uniformed officers in the courtroom is one factor of which judge's must be aware, and the failure of a trial judge to do so has resulted in

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Woods v. Dugger, 923 F.2d 1454, 1457 (11th Cir.1991)(quoting Estes v. Texas, 381 U.S. 532, 552, 85 S.Ct. 1628, 1637, 14 L.Ed.2d 543 (1965)(Warren, C.J., concurring)).

189
Id.

reversal.[190] In the case at hand, however, the trial judge noted that the number of officers present was fairly limited and that they were somewhat dispersed.[191] Additionally, he did not indicate that they were particularly disruptive. Based on these facts, the trial judge was not under a constitutional obligation to exclude the officers.[192] Admittedly, the presence of such officers may have been a factor negatively contributing to the prejudicial atmosphere surrounding the trial. Nevertheless, the

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Holbrook v. Flynn, 475 U.S. at 567; Woods, 923 F.2d 1454.

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The judge noted no more than five or six officers in a courtroom with a capacity of ninety-six to one hundred people and went on to indicate that they were not all in the same place. Rec. Vol. V, Trial Transcript, pgs. 88-90.

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Hill v. Ozmint, 339 F.3d 187 (4 th Cir.2003)(presence of six security officers, including bailiffs, five of whom were in uniform insufficient to create prejudice); United States v. Elder, 90 F.3d 1110, 1131 (6th Cir.1996)(denying relief because the marshals "were spread around the courtroom"); Bell v. True, 413 F.Supp.2d 657 (W.D.Va.2006)(denying relief and noting that in Woods, there were 45 uniformed guards in the courtroom, that many people in the small rural community in which the trial was taking place were employed or knew someone who worked at the prison where the guard was killed, and that the officer's family had a petition signed by five thousand individuals calling for the death penalty for murderers of prison guards).

number of officer's present was not so great as to "brand" Petitioner "with an unmistakable mark of guilt" or to have been a substantial factor in creating the unduly prejudicial atmosphere.[193] As such, the trial court's decision denial of trial counsel's motion appears to be in accordance with established Supreme Court precedent.

7. *Improper Translation of the Proceedings.*

Petitioner claims that the trial court failed to provide a proper English-Spanish translation of his trial in violation of his rights under the Louisiana Constitution and, ostensibly, under the United States Constitution. In his application for post-conviction relief, Petitioner offered by affidavit evidence that the translator was silent during certain parts of the trial and that the translator spoke a dialect of Spanish that is apparently difficult for Mexicans to understand.[194] At the evidentiary hearing held in response to Petitioner's application for post-conviction relief, the hearing judge dismissed Petitioner's claims stating that "[Petitioner] had an interpreter at every setting ...

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Holbrook, 475 U.S. at 571.

194
Rec. Vol. VI, Application for post-conviction relief, pgs. 48-49.

and ... the Mexican Consulate was also involved in this case."[195]

Courts have widely recognized that where the accused does not understand or speak English well enough to adequately comprehend or participate in the proceedings, the defendant's rights to fundamental fairness and due process of law require that an interpreter be provided to translate between English and the defendant's own language.[196]

In this case, the record demonstrates that the trial judge took care to provide Petitioner with an interpreter at every stage. Specifically, the record reflects that the trial judge signed an order on April 24, 1997, ordering the Indigent Defender Board to provide funds for Perez to retain a translator to assist him in the preparation of his defense.[197] In addition, when Perez was transferred to the Feliciana Forensic Facility, the judge's order mandated that he be examined and treated by a

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Id., at 45.

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See Marino v. Ragen, 332 U.S. 561, 68 S.Ct. 240, 92 L.Ed. 170 (1947); Perovich v. United States, 205 U.S. 86, 27 S.Ct. 456, 51 L.Ed. 722, 2 Alaska Fed. 750 (1907); United States v. Martinez, 616 F.2d 185, 188 (5th Cir.1980).

197
Rec. Vol. II, p. 160.

bilingual physician able to speak and understand English and Spanish.[198] While at Feliciana, a social worker translated the legal rights information provided to patients into Spanish and gave a copy of the tape to Petitioner, who listened to it regularly.[199] Although there is no mention at the beginning of the trial transcript about the presence of an interpreter, Petitioner admits that an interpreter was present at trial and the hearing judge who had presided over Petitioner's trial specifically noted that Petitioner had an interpreter at all significant times. Thus, Petitioner was not, in fact, denied an interpreter.[200]

The primary issue here is whether the translation provided was deficient. Petitioner argues that his trial interpreter "often sat silently while the judge and/or witnesses spoke in English" and that "instead of providing a translation ... the interpreter often attempted to engage [Petitioner] in informal conversation." In this regard, it is significant that Petitioner made no objection to the adequacy of his

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198
Id., at 193.

199
Id., at 173; State Rec. Vol. V, pgs. 224-25.

200
Rec. Doc. I, p. 23.

interpreter at trial.[201] "Only if the defendant makes any difficulty with the interpreter known to the court can the judge take corrective measures."[202]

Moreover, beyond his bare assertions, Petitioner does not offer any specific instances where the translation was inaccurate or insufficient. The fact that the translator spoke a Puerto Rican dialect of Spanish which the Consulate indicated might be difficult to understand for a person primarily familiar with the dialect of Spanish spoken in Mexico, does not mean Petitioner himself could not understand the translator. In fact, as Petitioner had lived in both Florida and Texas for many years prior to the incident, he might well have been exposed to the dialect spoken by his translator. Petitioner also does not explain how the allegedly insufficient translations actually prejudiced his defense.[203] Based

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Martinez, 616 F.2d at 188 (indicating that a failure to object weighs against overturning a trial court's decision regarding an interpreter). Although the Mexican Consulate sent a letter discussing its concerns regarding the adequacy of Petitioner's translator, neither Petitioner nor his attorney ever indicated that the translation was insufficient.

202
Valladares v. United States, 871 F.2d 1564 (11th Cir. 1989).

203
He does not, for instance, indicate that he could have provided certain information to his counsel or the court which would

on the information indicating that the trial court provided Petitioner with translators and in the absence of evidence establishing that Petitioner's translator was deficient, this Court cannot say that the state court's denial of Petitioner's claim was constitutionally improper.

8. *Petitioner's Competence to Stand Trial*

In his last assignment of error, Petitioner argues that he was not mentally competent at the time of trial. Petitioner previously raised this issue in his application for post-conviction relief. At the evidentiary hearing, the judge addressed the issue briefly and indicated that as he had also been the trial judge, he had fairly and thoroughly addressed the issue of Petitioner's competency prior to trial.[204]

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have aided in his defense had it not been for the insufficient translator.

204
The judge stated that "[he] dealt with every second of what occurred and ... was the one who said that if we were going to err, let's err on the side of caution by sending him to get the treatment that he needed to get. And [he] was the one who appointed all the psychiatrists and psychologists and dealt with it." Rec. Vol. VI, Evidentiary Hearing Transcript, p. 45.

Appendix B

It is a violation of due process to try and convict a defendant who lacks mental competence.[205] The constitutional standard for competency is whether a defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him."[206] In order to ensure that a defendant is not tried or convicted while incompetent, states are required to conduct an inquiry into an accused's competence if the evidence raises a bona fide doubt as to competency.[207] If a trial court has conducted a hearing regarding a defendant's competency prior to making a ruling, the court's determination is a finding of fact entitled to the presumption of correctness.[208] Habeas petitioner's claiming

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Cooper v. Oklahoma, 517 U.S. 348, 354, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996); Pate v. Robinson, 383 U.S. 375, 378, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); Carter v. Johnson, 131 F.3d 452, 459 (5th Cir.1997).

206
Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) (per curiam).

207
Holmes v. King, 709 F.2d 965, 967 (5th Cir.1983)(citing Pate, 383 U.S. at 385).

208
Carter v. Johnson, 110 F.3d 1098, 1106 (5 th Cir.1997).

incompetence at the time of trial bear a "threshold burden of proof which must be satisfied before the habeas court has a duty to investigate the constitutional challenge further."[209] This requires a showing that facts are sufficient to "positively, unequivocally, and clearly generate a real, substantial and legitimate doubt as to his mental competency at the time of trial."[210]

Petitioner utterly fails to meet his burden in this case. Petitioner cites no facts or circumstances that would give rise to doubts about Petitioner's competency during his trial. In fact, the record is replete with evidence supporting the inference that Petitioner was competent. As the Louisiana Fourth Circuit Court of Appeal mentioned, Dr. Ritter, Dr Salcedo, Dr. Pena, and Dr. Carrington examined Perez for competency prior to trial, and Dr. Ritter and Dr. Salcedo wrote the trial court a letter stating that Perez was competent to proceed.[211] At pre-trial motions, there were no motions by the defense

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209
Washington v. Johnson, 90 F.3d 945, 950 (5th Cir.1996) (citations omitted).

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Carter, 131 F.3d at 460 (citing United States v. Williams, 819 F.2d 605, 609 (5th Cir.1983)).

211
Fourth Circuit Opinion, State v. Perez, 98-KA-1407, November 3, 1999, pgs. 29-30.

claiming that Perez was incompetent to proceed to trial.[212] In fact, in opening remarks, the defense told the jury that Perez's treating physician, Dr. Carrington, would testify that Perez was medicated with Haldol so that he could be competent and go through with the trial.[213] Dr. Ritter, stipulated as an expert in forensic psychiatry, testified that he had examined Perez and found him competent to proceed.[214] Dr. Salcedo, stipulated as an expert in forensic psychology, testified that he had examined Petitioner and found he was in remission, competent to proceed, understood the nature of the charges against him, and was able to assist his counsel in preparing a defense.[215] Dr. Carrington, his treating psychiatrist at Feliciana Forensic Facility, where Petitioner was sent when found incompetent to proceed in August 1997, as well as afterward when Petitioner was returned to Orleans Parish Prison to await trial, testified that Petitioner was competent

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212
Rec. Vol. V, Trial Transcript, pgs. 1-4.

213
Id., at 19.

214
Id., at 139.

215
Id., at 163-4.

to proceed to trial.[216] In closing arguments, the defense stated that while Petitioner had been incompetent prior to trial, he was placed on drugs at Feliciana Forensic Facility and became competent.[217]

As the Court previously found error in a jury unreasonably disregarding the unanimous opinion of Petitioner's experts, the Court refuses to now question a state court's reliance on the opinion of these same experts. Thus, in light of the overwhelming expert testimony indicating that Petitioner was competent and the similar assertions made by defense counsel throughout his trial, the Court finds that Petitioner was not tried while he was incompetent in violation of his Constitutional rights. Moreover, given how strongly the record supports the conclusion that Petitioner was competent, the Court finds no error in the state court's holding. the record strongly substantiates that Petitioner was competent to stand trial.

VIII. CONCLUSION

Having considered the complaint, the record on direct appeal and for post conviction relief, and

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216
Rec. Vol. V, Trial Transcript, pgs. 215, 220, 221, 224, 225, 228.

217
Id., at 314, 316.

the applicable law, it is determined that Petitioner has demonstrated that his state conviction and sentence present grounds for the relief requested. Accordingly, IT IS ORDERED that the petition of SALVADOR PEREZ for writ of habeas corpus under 28 U.S.C. § 2254 is GRANTED.

IT IS FURTHERED ORDERED that the state either retry Salvador Perez within 120 days of this order or dismiss the charges. The state shall notify the defense and the Court of its intention within 30 days of this ruling.

s/ Helen G. Berrigan
HELEN G. BERRIGAN
UNITED STATES DISTRICT JUDGE

APPENDIX C-OPINION OF THE LOUISIANA FOURTH CIRCUIT COURT OF APPEAL DATED NOVEMBER 3, 1999

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

No. 98-KA-1407

APPEAL FROM
CRIMINAL DISTRICT COURT, ORLEANS PARISH
NO. 385-086, SECTION "A"

STATE OF LOUISIANA

v.

SALVADOR PEREZ

(Court composed of Judge William H. Bynes, III, Judge Charles R. Jones, and Judge Dennis R. Bagneris, Sr.)

Defendant Salvador Perez (Perez) appeals his conviction of first degree murder, and sentence of life imprisonment. Finding no error by the trial court, we affirm the judgment.

Appendix C

PROCEDURAL HISTORY

Perez was charged by grand jury indictment on September 12, 1996, with first degree murder, a violation of La. R.S. 14:30. Following a lunacy hearing on January 30, 1997, defendant was found competent to proceed.[1] On March 7, 1997, the trial court denied defendant's motion to suppress the evidence. On April 4, 1997, defendant withdrew "any former plea of not guilty" and entered a plea of not guilty by reason of insanity.

Following three additional lunacy hearings, the trial court found Perez dangerous to himself and others and remanded defendant to the Feliciana Forensic Facility. On December 16, 1997, Perez was transferred to Orleans Parish Prison to await trial. Following trial before a twelve-person jury on March 11-14, 1998, he was found guilty as charged. The jury unanimously recommended life imprisonment in the penalty phase. On March 27, 1998, the trial court denied Perez's motions for post-verdict judgment of acquittal and for a new trial. He waived legal delays and was sentenced to life imprisonment at hard labor, without benefit of parole, probation, or

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1
A portion of the lunacy hearing was also held on October 8, 1997.

suspension of sentence. A notice of appeal was filed on the date of sentencing.[2]

The record was then lodged in this Court on June 8, 1998. The record was supplemented in July 1998 with a transcript of the April 17, 1997 lunacy hearing.[3] The transcripts from the additional lunacy hearings were later supplemented into the record of the Court.

FACTS

At trial, Byron White, a supervisor of security at the New Orleans Fair Grounds race track, testified that on July 17, 1996, at around 10:00 a.m., his office received a suspicious call from a nearby resident. The caller stated that he saw a man and a little boy were near barn twenty-six with a gun. Officer White testified that he traveled down Leda

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2
The sentencing transcript is dated May 27, 1998. However, the minute entry states that sentencing was on March 27, 1998. The docket master states that sentencing was on March 27, 1998. The form committing defendant to the custody of the Department of Corrections states that sentencing was on March 27, 1998. The notice of appeal states that it was filed on March 27, 1998.

3
The transcript was received in the Judicial Administrator's office on July 14, 1998, and subsequently filed in this court.

Court (street) ran right into barn twenty-six. When Officer White, who was in uniform, approached that location in his golf cart, he encountered Perez, who drew out a small black handgun and held it by his side. Perez pulled the boy in front of him, and told Officer White to leave them alone because no one was going to take his kid. Officer White then retreated and called the police. At trial, Officer White identified Perez as the person he encountered that day, and identified a gun in evidence as resembling the one Perez had that day. Officer White confirmed that Perez, who was Spanish, spoke perfect English on that day.

Arden Taylor, a New Orleans Police Lieutenant, testified that he was assigned to the Fair Grounds on July 17, 1996. He testified that arrived at the racetrack approximately 6:30 p.m., and learned that a twelve-year old boy had been abandoned near the racetrack and was in the security office. Further investigation revealed that this boy had been with his father, who had confronted Officer White earlier in the day. The boy, Salvador Perez Jr., informed the officer that he and his father had come from Texas in a van that was parked nearby. Lieutenant Taylor testified that the boy told him that his father had "ripped off" some drugs dealers, and that his father believed he was being followed by gangs from Texas. Lt. Taylor called for a canine unit because the boy indicated that narcotics were involved. Though narcotics were not

found, the van was impounded pending further investigation.

Debbie Mastio testified that on July 17, 1996, she was living in the top half of a duplex located at 1437 Leda Court. She testified that she arrived home that evening at approximately 10:30 p.m., and noticed that her hot water was not running. Dr. Elliot Black, a friend interested in purchasing a photograph she had taken, arrived shortly before 11:00 p.m. While Dr. Black was there, Ms. Mastio went to check on her hot water heater, located downstairs from her second-story apartment. She testified that she went halfway down the back stairs, leaned over, and shined a flashlight down toward the door of the utility room housing the water heater. As she shined the light around the utility room, Ms. Mastio testified that she saw a man, who suddenly pulled his hands up and pointed a long, cylindrical, shiny, metallic object at her. She ran back inside and tried to call her downstairs neighbor, but got no answer. She testified that Dr. Black went outside with the flashlight, only to return in a few seconds, locking the door behind him. Ms. Mastio then reported the incident to the police. She telephone the police again after fifteen minutes had passed. When the police arrived, they walked through her apartment to the back door. Ms. Mastio said Officer Chris McCormick walked down the stairs. She remained inside. After a few seconds, she heard a pop. The other officer radioed for help, and backup officers arrived. She testified that the man she had

seen that night could have been Perez, but that the person seemed thinner,and had dark and wet or oily hair, pulled back. She also testified that she did not remember such a bulky moustache. Ms. Mastio identified a number of photographs, which depicted the scene as it appeared that night.

Dr. Elliot Black's testimony generally tracked that of Ms. Mastio. He testified that when he went down the rear stairs to check out the situation, he saw a man down there pointing a gun at him. After police arrived and Officer McCormick went down the back stairs, Dr. Black heard a pop. He testified that the officer fell at the bottom of the stairs.

Artie Jackson, a New Orleans Police Officer, testified that he and Officer McCormick were working the night shift on July 17, 1996. As he and Officer McCormick were leaving from roll call, they received a call on Leda Court. Officer Jackson testified they arrived at the Leda Court address neither their lights nor their siren were on. Officer McCormick then went down the rear stairs after speaking with Ms. Mastio. Officer McCormick was subsequently shot on the last step, and he fell backwards, clutching his chest. Officer Jackson then radioed for backup. He testified that certain areas of the yard were very dark.

New Orleans Police Sergeant Andrew Washington testified that he responded to a "signal 108" or officer in danger radio call on the night of

July 17, 1996 at the Leda Court address. He said that after the shooting officers recovered a live .25 caliber round in the utility shed and one spent shell casing. Sgt. Washington said four canine units came out. The police officers searched the areas around six or seven homes to the right of Ms. Mastio's residence, and then proceeded to search homes to the left. Officer Chambliss's dog alerted to a person possibly underneath 1429 Leda Court, the residence immediately to the left of Ms. Mastio's. Officer Chambliss ordered his dog under the house, and two shots rang out. His dog gave out a yelp and came back out. Officer Chambliss sent the dog under again, assumed a prone position on the ground, and ordered Perez to come out. Officer Chambliss then fired two shots, striking Perez twice and disabling him. Other officers retrieved Perez and recovered the .25 caliber weapon, live rounds, and two cartridge casings. Sgt. Washington identified the gun recovered and numerous photographs depicting the scene as it appeared that night, including photographs of Officer McCormick's flashlight, radio, and asp on the ground where he fell after being shot. Sgt. Washington testified that Ms. Mastio positively identified Perez as the person she had observed in her utility shed shortly after the officers arrested Perez.

Officer Raymond Veit testified that he responded to the call on Leda Court on July 17, 1996. He testified that he was in a position to see an individual fighting with the police dog underneath

the house. Officer Veit testified that Officer Chambliss told him during this time that Perez just shot his dog. He testified the police were all giving Perez verbal commands in English to stop resisting, which he eventually did. Officer Veit testified the officers got the police dog out, and he went under the house and dragged out the limp Perez.

Dr. Myron Smith, a doctor of veterinary medicine, testified that he examined the canine dog, Max, on July 19, 1996, at an animal emergency clinic in Jefferson Parish. Dr. Smith x-rayed Max and removed a bullet, which he turned over to Officer Hosley.

Detective William B. Williams Jr. testified that on October 4, 1996, he went to the New Orleans Police Department auto pound and took photographs of a 1991 Ford van with Texas license plates which was involved in this case. Det. Williams identified these photographs at trial. Det. Williams also recovered evidence from the vehicle, which included two 3x5 inch memo pads; a note pad; a "Berger Field tool rental;" a road map of the United States; a receipt for $450.00; a pair of binoculars; a Wal-Mart receipt dated July 13, 1996 from Seguin, Texas; and an ice chest containing what appeared to be a lot of decayed food.

William Newman, a pathologist at the Louisiana State University School of Medicine, was qualified as an expert in pathology. Dr. Newman

testified that he performed the autopsy on Officer McCormick. Dr. Newman testified that the cause of Officer McCormick's death was a single gunshot wound to the chest that pierced his heart, left lung, and rib cage, coming to rest under the skin beneath the officer's shoulder blade. Dr. Newman identified the bullet he recovered from Officer McCormick's body. On cross-examination, Dr. Newman identified a report from the Medical Center of Louisiana at New Orleans, which showed that Perez tested negative for the presence of drugs and alcohol on July 22, 1996.

Officer Kenneth Leary Jr., a firearms examiner with the police department's crime laboratory, identified a Lorcin model L25 .25 caliber semi-automatic pistol, serial number 049448, recovered from the crime scene, and two .25 caliber cartridge cases. One of the cartridges were recovered from 1437 Leda Court, and the other from 1429 Leda Court. Officer Leary stated that both of these .25 cartridge cases matched the firing pin impression and breech face markings made by the Lorcin pistol. Officer Leary also testified that the striation markings on the bullet recovered from the body of Officer McCormick matched those of a bullet test fired from the Lorcin pistol. Officer Leary testified the Lorcin pistol was used to kill Officer McCormick. Officer Leary found that a 9mm cartridge case and the spent 9mm bullet recovered from 1429 Leda Court had both been fired by Officer Chambliss's 9mm duty weapon. Officer Leary determined that a

spent 9mm bullet recovered from Perez matched the 9mm test bullet fired from Officer Chambliss's duty weapon. Finally, Officer Leary stated that a .25 caliber spent bullet recovered from Max the police dog was positively matched to the Lorcin pistol. Officer Leary further testified that he could not get the pistol to fire semi-automatically, but had manually retract the slide and use his finger to guide the next bullet from the magazine into the chamber.

Danine McCormick testified that she had been married to Officer Chris McCormick for five years at the time he was murdered.

Dr. Kenneth Ritter was qualified by stipulation as an expert in the field of forensic psychiatry. Dr. Ritter interviewed Perez on December 18, 1997, in the company of Dr. Raphael Salcedo, whose first language is Spanish and who translated for Dr. Ritter. Dr. Ritter, who was appointed by the trial court to determine Perez's competency to proceed, concluded that Perez was competent to proceed.[4] However, Dr. Ritter diagnosed Perez as a chronic paranoid schizophrenic, finding that he had all the signs and

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In other words, Perez could assist his attorney in presentation of his defense in court, could appreciate the nature of the charges and the proceedings against him, and could effectively participate in his own defense.

symptoms-delusions, hallucinations, and disorganized thinking. Dr. Ritter testified that it was his opinion that Perez did not understand the difference between right and wrong when he shot Officer Chris McCormick on July 17, 1996. He based his opinion on the fact that Perez had been under the delusion that people were out to kill him, and that he fled from his home in Seguin, Texas to avoid these people. Perez took evasive maneuvers such as sleeping in a Texas park rather than in a motel. He took country roads rather than regular highways. Perez's wife and son said Perez had been suffering from this delusional condition for at least two weeks prior to the murder.

There was information that Perez took his son because he felt that he could trust him, and that he did not trust his wife because he thought that she might be involved. Dr. Ritter testified that Perez was acting delusional when he grabbed his son when he was approached by the security guard at the Fair Grounds, indicating that he was afraid that the security guard would try to take his son. Dr. Ritter testified that when Perez became separated from his son later that day, he believed that someone had kidnapped his son, which could have reinforced his delusional thinking. However, Dr. Ritter did not believe that Perez was malingering.

On cross-examination, Dr. Ritter again testified that he only met with Perez once. Dr. Ritter said that at the time he examined Perez he was in

"decent remission" and not having delusions, but did have some signs of disorganized thinking. He said he met with Perez's wife and son only a few weeks prior to trial, on February 3, 1998. He said they spoke English very well. He found them to be simple and unsophisticated, and said they responded to his questions directly, without any attempt to evade or embellish anything. They told Dr. Ritter that for some weeks prior to the shooting of Officer McCormick Perez felt threatened by his in-laws and their drug-dealing neighbors. Perez would whisper so low that at times no one could hear him. He saw cars passing back and forth and would think the cars were occupied by his tormentors. Perez's son stated that he and Perez avoided stops for food or drink while traveling to New Orleans. Once, when they did stop at a convenience store and the son went inside, Perez became so concerned that something was going to happen to his son that he blew the horn to get the son to come back to the car, and they left. Dr. Ritter claimed that Perez's son said Perez would push buttons in the van for some sort of "magical reason," thinking that this would in some way throw the people who were following them off the track.

Dr. Ritter testified that it would not make any difference in his opinion if Perez had packed an ice chest with food for the trip, had purchased maps, and had stopped at Wal-Mart. Dr. Ritter admitted that he had not examined Perez in a delusional state, stating that Perez had been released from the Feliciana Forensic Facility after responding to

medication, which, he said, was a classic situation seen in paranoid schizophrenia. Dr. Ritter admitted that he did not objectively corroborate anything, and that his conclusions were essentially based on the stories of his wife and Perez's adolescent son.

Dr. Raphael Salcedo was qualified by stipulation as a forensic psychologist. He first examined Perez on October 8, 1996. He testified Perez claimed he did not know his date of birth, leading the doctor to conclude that Perez was malingering. Dr. Salcedo was later informed by defense counsel that Perez was behaving oddly. Therefore, Dr. Salcedo evaluated defendant again on May 6, 1997. On this examination Perez was verbalizing and sounded psychotic. Perez said people from Texas were following him; and his thought processes seemed more disorganized. Dr. Salcedo testified at that time he started to have some doubts about the issue of malingering. He recommended that Perez be committed to the Feliciana Forensic Facility (the "FFF"). It was determined by the staff at FFF that Perez was extremely paranoid and had a serious mental illness, and that he was not competent to proceed. Dr. Salcedo testified Perez was treated with an anti-psychotic medication at the hospital. When he and Dr. Ritter examined Perez in December 1997, Perez was found to be displaying some psychotic symptoms, but they were in fairly good remission. Therefore, he and Dr. Ritter found Perez competent to proceed.

Appendix C

Dr. Salcedo testified he and Dr. Ritter then interviewed Perez's wife and thirteen year-old son in an effort to determine whether Perez was sane at the time of the offense. Dr. Salcedo's testimony in this regard generally tracked that of Dr. Ritter. He did add that Perez's wife related that Perez had no history of psychiatric problems or treatment. Dr. Salcedo testified he learned from some unknown source that Perez's father had displayed a similar pattern of late onset psychosis. Dr. Salcedo testified it is unusual for someone Perez's age to develop a psychotic disorder, that most are seen in people in their early to mid-twenties. Dr. Salcedo testified that it was not too difficult to detect malingerers; most people do not know the constellation of symptoms justifying a diagnosis of psychosis. He testified that, based on Perez's educational background and his work experience, he did not think Perez could develop such a classic response to the medication prescribed to him at the FFF-which takes time to begin working in the brain-and also to the onset of the symptoms. Dr. Salcedo testified that is was his opinion that Perez's condition had progressed during the trip to New Orleans and that, with the disappearance of his son, he was so actively psychotic that he was unable to distinguish right from wrong at the time of the offense, and in fact believed he was acting in self-defense.

On cross-examination, Dr. Salcedo explained that he first found Perez competent to proceed because Perez was simply answering that he did not

know the answers to all of the questions, and that he therefore suspected Perez of possible malingering as to his memory. However, Dr. Salcedo read his report dated May 6, 1997, wherein he stated: "Mr. Perez presented as previously; i.e., as an individual who is at the very least grossly exaggerating any psychopathology which might actually be present." Dr. Salcedo agreed that a person can become educated to giving an answer to put him in a psychotic light, but said "I'm not convinced that that's the case here." On redirect examination, Dr. Salcedo testified that he did his doctoral dissertation on malingering, and said that it is one of the first things he feels the need to rule out in cases like Perez.

Dr. Jose Pena, qualified by stipulation as an expert in the field of clinical psychiatry, interviewed Perez in December 1997, while Perez was in the FFF, to determine Perez's competency to proceed. Dr. Pena interviewed Perez again on March 8, 1998, days before trial, as to Perez's mental state at the time of offense. It was Dr. Pena's opinion that Perez was suffering from a psychotic disturbance at the time of the offense. Dr. Pena based his determination on his interview with Perez, his wife and son, and for the same reasons as Drs. Ritter and Salcedo. He added that Perez's wife related that Perez was paranoid even in situations where supposedly no one else was around, such as when they were in a car alone. The son said Perez believed his wife and mother might be involved in the plot.

Dr. Pena testified these symptoms described by Perez's wife and son were very similar to the symptoms found on examination by physicians at the FFF-a psychotic thinking disturbance that included prominent symptoms of paranoia and persecution. Dr. Pena testified that Perez did not present as a malingerer, nor did he believe Perez's wife and son were being untruthful. In these areas, again, his testimony generally tracked that of Drs. Ritter and Salcedo. It was Dr. Pena's opinion that at the time Perez shot Officer McCormick he was not able to distinguish right from wrong because of the severe psychotic mental disturbance.

On cross-examination, Dr. Pena admitted that he had only interviewed Perez's wife and son over the telephone, on March 8, 1998, a few days prior to his testifying. However, he testified he did not believe this type of interview affected his findings. When asked whether it was possible that Perez simply shot the officer because he did not want to go jail, Dr. Pena testified he could imagine that.

Dr. Guillermo Urrutia, who was qualified by stipulation as an expert in clinical psychiatry, testified that it was his impression that Perez had a delusional disorder of a persecutory type, which, he testified, usually is a disorder that happens in middle or late middle life. Dr. Urrutia interviewed Perez nine months after the crime. He did not think Perez was malingering. Dr. Urrutia went into detail about the things Perez would say, and that he was

uncooperative. Perez accused Dr. Urrutia of being an investigator, not a doctor, and said he would not talk to him until his wife got there. Perez said he was driving down I-10 and people were following him and he had to press buttons on the dashboard of the van to deceive them. Dr. Urrutia testified Perez was very confused on the subject of the shooting, which the doctor found consistent with someone who had been in a very panicked state. It was his opinion that Perez did know right from wrong when he shot Officer McCormick. He testified Perez was in a state of panic and was totally psychotic, insane.

On cross-examination, Dr. Urrutia said he did not believe Perez was schizophrenic, but felt there was room for a difference of opinion. He testified Perez would answer a question with a question, indicating that he was very suspicious and did not want to commit to an answer. Dr. Urrutia testified Perez never told him that he shot a police officer, but said he saw somebody coming in the dark who he felt had taken away his son, and he shot at a shadow. He testified Perez told him that he shot the dog because the dog was biting him and dragging him from underneath the house. However, Dr. Urrutia testified he could never pin Perez down to tell him exactly what happened because, the doctor felt, Perez did not remember. Dr. Urrutia admitted that Perez was not experiencing hallucinations.

Appendix C

The court, the jury, and the attorneys for both sides visited the scene of the crime on Leda Court, without Perez, who waived his presence.

Dr. David Carrington, who was qualified by stipulation as an expert in the field of forensic psychiatry, was a psychiatrist employed at the Feliciana Forensic Facility. After Perez was sent to the FFF on August 9, 1997, Dr. Carrington testified it was his job to evaluate him and, if possible, treat him and restore him to competency so that he could stand trial. Dr. Carrington testified that he did not examine Perez with regard to his sanity at the time of the offense. On his initial examination, Dr. Carrington found Perez's thought processes quite disorganized. He had a great deal of difficulty relating past events, his history, and had "flight of ideas," jumping from one subject to another, which, Dr. Carrington testified, was not an uncommon finding in someone who has a significant degree of mental illness. Perez related that he previously had been hearing sounds of machinery and music. One week later, Perez's thinking continued to be disorganized, and he continued to hear music and machinery. Perez also said he could communicate with his wife; he could hear her voice in his head. Generally, Perez was observed on the ward to keep to himself-he was the only Spanish-speaking individual on the ward at first. He minded his own business and was able to get along with the ward routine, i.e., eat his meals, take his shower, etc. Because of his thinking and hallucinations, Dr.

Appendix C

Carrington prescribed the anti-psychotic medication Haldol. The doctor learned from Perez that he had a third-grade education; and to the doctor's knowledge, illiterate in both English and Spanish. Dr. Carrington testified he did not believe Perez was malingering, something he testified they are acutely aware of at the FFF. Dr. Carrington increased the Haldol dosage after Perez had been at the FFF for three weeks, and as of the fourth week, Perez was free from any hallucinations or disorganization of his thinking.

On cross-examination, Dr. Carrington admitted that Perez's circumstances during his thirteen-months of incarceration after his arrest but before his move to the FFF could have contributed to the condition he was in when first seen at the FFF. He testified while that Perez was at the FFF he never acted in an aggressive manner, caused a disturbance, or got into a fight on the unit, but noted that this was completely different from whether or not he posed a potential danger if released to the community.

Dr. Sarah Deland, qualified by stipulation as an expert in the field of forensic psychiatry, testified that she was appointed by the court to a sanity commission along with Dr. Salcedo. It was her opinion that Perez had a significant mental illness, a psychotic disorder similar to schizophrenia. Dr. Deland was unsure of the actual definitive diagnosis because, she said, several mental disorders have

similar symptoms. Dr. Deland admitted that after her first examination of Perez she and Dr. Salcedo pronounced him competent to proceed, and in fact, she found that he was not suffering from any mental illness. However, she testified, as had Dr. Salcedo, that Perez did not really talk a whole lot during that examination, which she said was conducted with an attorney present, another person with the public defender's office, and a court reporter taking down everything that was said. She testified that in such a case a paranoid person suffering from feelings of persecution might not be forthcoming. Dr. Deland testified that in a forensic setting, malingering is always an issue to be considered, but that she did not believe Perez was malingering. She testified he presented a classic case of a person suffering delusions of being pursued, persecuted, and threatened. Dr. Deland also testified that the information she received from Perez's wife and son was consistent with the progression of the illness she saw in Perez, and testified they did not strike her as persons attempting to manufacture anything. She testified she did not believe Perez knew right from wrong on July 17, 1996 when he shot Officer Chris McCormick.

Rosa Perez, Perez's wife, testified that she and Perez had been married for fifteen years and had five children. She testified that some two weeks prior to the time he left home on July 17, 1996, he was very quiet. When he was outside or at a store, Perez would look around his surroundings, afraid

someone was looking at him or watching him. He would talk low, in a whisper, like he was afraid someone was going to hear him. He would look out of the windows, in an edgy mood. She said he did not write or speak English. On the day he left home, he said he was going to feed their five cows and come right back. Mrs. Perez said that the night before, at approximately 11:00 p.m., dogs had gotten some of their clothes off the clothesline, and he was hesitant to retrieve the clothes, suggesting that they leave them until the next day. She implied that he was afraid to go outside. She finally prevailed on him to retrieve one of her favorite shirts. Mrs. Perez testified she worked at Wal-Mart, and drove to and from work in their van. She identified the two notebooks found in the van, and said they kept an ice chest in the van for when they went out to "the land," presumably where they kept the cows.

On cross-examination, Mrs. Perez testified she did not remember whether the ice chest in the van had any food in it the last time she saw it. She said they had no map in the van. She was asked if she remembered Detective Joey Catalanotto asking her whether her husband had any kind of psychological problems. She first answered in court that she told Det. Catalanotto that she did not remember his having "something this serious before." After being shown what presumably was a transcript of her statement, she testified that she had replied "not that I remember" to the question of whether he had had any psychological problems. She testified that

she told a Dr. Kromberger that he had been forgetful. After being shown Dr. Kromberger's report, she testified she told him that she did not remember his acting strangely. On redirect examination, Mrs. Perez testified she told Dr. Kromberger that her husband had been exhibiting different behavior prior to the weeks before he left.

Salvador Perez Jr., the fourteen year-old son, testified that prior to the morning he and his father left Seguin, Texas, his father had not been sleeping much, he had grown more suspicious, and his behavior had been quieter. Salvador Jr. testified that on the way to feed the cows, his father said he was going to drive around so that he could lose the people following him. When they stopped at a convenience store, Salvador Jr. went inside. As he went to check out, his father began honking the horn. He testified his father was afraid and wanted to leave as soon as possible. Salvador Jr. testified that while driving his father was pushing buttons on the roof of the van fast, saying he was acting like he was doing something so that the people who were following them would try and see what he was doing. Salvador Jr. also testified that while on the highway, when his father would see the other cars around him he would speed up a little bit to lose them. Salvador Jr. testified that after he was taken into custody by police, he never told them about his father being involved in drugs or narcotics. He testified he had never seen or heard anything about his father being involved in drugs. However, he did tell police that

his mother and father believed that his step-father's friends sold drugs, and that he, Salvador Jr. thought that they had asked his father if he wanted to be involved in the drug business, but that his father turned them down. He further admitted telling police that both his mother and father thought that his father did something which made "the drug buyers" mad, and that his father thought they were after him because he did not want to sell drugs. He also testified that when he talked to his father he always talked to him in Spanish, never in English. He testified that when he talked to the doctors about his father he told them the truth, and was telling the truth at trial.

Detective Joseph Catalanotto testified that when he asked Mrs. Perez in July 1996 whether her husband had any psychological proble[illegible].s, she answered "No, not that I know of." Det. Catalanotto also testified that Salvador Jr. related to him that his father had rejected Salvador's step-grandfather's offer to engage in some type of narcotics business.

Dr. Carlos Kromberger was qualified by stipulation as an expert in clinical psychology. Dr. Kromberger had been awarded a "diplomat" in clinical psychology, granted to approximately four percent of psychologists in the United States. Dr. Kromberger evaluated Perez during several interviews over a period of fourteen hours in April 1997. Dr. Kromberger testified that Perez had IQ scores within the mildly retarded range. However,

he testified he saw indications that Perez could function at a higher level; he really had a little bit more understanding than what he was showing on the tests. He testified Perez cooperated but was guarded. Dr. Kromberger did not believe Perez was mentally retarded. Nevertheless, he diagnosed Perez to be suffering from a severe persecutory delusional disorder, although he did not find Perez to be schizophrenic. He testified Perez said he thought people were following him and he was afraid they were going to kill him. He initially thought his wife was in on the plot, and was worried that his son was going to get killed. He told his son that he wanted to go live in Florida, where they had lived until they were wiped out by Hurricane Andrew. Perez told Dr. Kromberger that he shot a dog, and that Perez believed the people approaching him were the ones that had taken away his son. "So he must have been in an acute state of anxiety or fear, very frightened. And when he fired off tragically killing a policeman, he probably didn't have any idea what was going on". Dr. Kromberger testified he did not think Perez knew right from wrong when he killed Officer McCormick. He thought Perez was in an acute psychotic state at the time. He testified he did not know whether or not Perez had a chance to see the officer, "but he certainly didn't know what he was doing." He did not think Perez was malingering.

On cross-examination, Dr. Kromberger speculated that if the van had been towed, Perez probably was on Leda Court looking for some sort of

refuge. He admitted the possibility that there were other reasons why Perez did what he did. Dr. Kromberger read a paragraph from his report stating that, according to Mrs. Perez, her husband did not have any serious medical problems; that he had always had memory difficulties; that she did not notice anything different or strange about him before he left home; and that he had telephoned her after he left, and told her that the neighbors were involved with drugs and were trying to kill him. Dr. Kromberger testified Mrs. Perez did not mention that Perez was whispering until he talked to her within one to three months of trial.

ERRORS PATENT

A review of the records reveals two errors patent.[5]

5
Neither the trial transcript, minute entries, nor the docket master reflect that the jury was sequestered in this capital case as required by La.C.Cr.P. art. 791(B). However, upon request by this court, the trial court issued a per curiam attesting that the jury had been sequestered "[o]n each and every day of both the guilt phase and the penalty phase of this case." The per curiam does not reflect that each juror was sequestered after he or she was sworn, as required by La.C.Cr.P. art. 791(B). However, Perez does not raise the issue of any defect in sequestration, and the record does not show any error or prejudice to him in this regard. See State v. Robertson, 97-0177, p. 16 (La. 3/4/98), 712 So.2d 8, 23, cert. denied, Robertson v. Louisiana, 525 U.S. 882, 119 S.Ct. 190,

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Neither the docket master nor the minute entries show that Perez was ever arraigned or entered an initial plea. However, the minute entry for April 4, 1997 reflects that on that date Perez "WITHDREW ANY FORMER PLEA OF NOT GUILTY" and entered a plea of not guilty by reason of insanity.

"The arraignment consists of the reading of the indictment to the defendant by the clerk in open court, and the court calling upon the defendant to plead." La.C.Cr.P. art. 551(A). However, "[a] failure to arraign the defendant or the fact that he did not plead, is waived if the defendant enters upon the trial without objecting thereto, and it shall be considered as if he had pleaded not guilty." La.C.Cr.P. art. 555; State v. Scott, 97-0028, p. 6 (La.App. 4 Cir. 3/18/98), 709 So.2d 339, 342.

The record does not reflect that Perez made any objections regarding his arraignment or pleas prior to trial. Also, the plea of not guilty by reason of insanity upon which he proceeded to trial was entered by Perez through counsel, in his presence. Therefore, any irregularity in failing to arraign Perez or have him initially enter a plea was waived.

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142 L.Ed.2d 155 (1998).

Appendix C

ASSIGNMENT OF ERROR NO. 1

By this assignment of error, Perez argues that the trial court erred in allowing a third-year law student to assist his trial counsel in this capital trial.

La.C.Cr.P. art. 512 provides in pertinent part that: Counsel assigned in a capital case must have been admitted to the bar for at least five years. An attorney with less experience may be assigned as assistant counsel.

Perez also cites La. R.S. 15:150(B)(C)(2), which provides for the establishment of regional death penalty centers, and states that "[n]o attorney with less than five years criminal trial practice shall serve as lead counsel in any death penalty case assigned to the regional death penalty center."

It is not disputed that Robert Jenkins, the attorney who represented Perez, was qualified to represent him under the five-year requirement of La.C.Cr.P. art. 512, and, assuming the statute is applicable, La. R.S. 15:150(C)(2). However, Andrew Michaelson, a third-year law student at Loyola University Law School, actively participated in Perez's trial, presumably pursuant to Louisiana Supreme Court Rule XX, providing for the participation of law students in trial work. Rule XX, § 3(c) (as amended November 21, 1988) allowed law student participation in any criminal matter in

which the defendant had the right of assignment of counsel.[6]

Perez executed a waiver authorizing Mr. Michaelson to represent him under the direct supervision of his attorney, Robert Jenkins. Rule XX, § 3 specifically requires such a waiver. He attacks that waiver, arguing that he was illiterate and had pleaded not guilty by reason of insanity. However, the failure to obtain such written waiver or to adhere to other procedural requirements of Rule XX is not a violation of a statutory or constitutional right. State v. Edwards, 351 So.2d 500, 504 (La.1977). The failure to comply with the requirements of Rule XX might, in a given case, amount to reversible error if prejudicial to the substantial rights of the accused. Id., citing La.C.Cr.P. art. 921. In the instant case, as in

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Defendant cites State v. Clark, 97-0359 (La.App. 4 Cir. 11/12/97), 703 So.2d 131, writ granted, remanded, 97-3184 (La.4/24/98), 717 So.2d 1165, on remand, 97-0359 (La.App. 4 Cir. 10/7/98), 720 So.2d 134, where Mr. Michaelson was barred at the last minute from questioning an expert medical witness on behalf of the defense in a May 1996 second degree murder trial because at that time he was not qualified to be a student practitioner under Rule XX. Presumably, this was because, although a law student, he was not yet a third-year law student, as required by the rule. However, the record indicates that at the time of the March 1998 trial in the instant case, Mr. Michaelson was a third-year law student. Therefore, Clark has no bearing on this case.

Edwards, Perez cites no prejudice to him due to any defect in obtaining the waiver, or due to any failure by Mr. Michaelson to comply with other requirements of Rule XX, nor does the record reflect any such prejudice.

But the primary thrust of Perez's argument is that Mr. Michaelson was simply not qualified to represent him in this capital case because he was not an attorney. It is well-settled that a defendant is considered to have been represented by counsel where he is represented by a student practitioner and a qualified attorney. See Edwards, 351 So.2d at 504. In the instant case, Perez's attorney, Mr. Jenkins, cross-examined or declined to cross-examine twelve of the fifteen witnesses presented by the State; argued one motion and made a number of objections throughout the trial; and made the closing argument. Mr. Michaelson made the opening statement; argued two motions during the trial; cross-examined two State witnesses, declining to cross examine another; and questioned five medical experts on direct examination.

Mr. Jenkins was a qualified attorney in the case, as well as Mr. Michaelson's supervising attorney. Mr. Michaelson was a student practitioner functioning just as he could have in a non-capital case pursuant to Louisiana Supreme Court Rule XX. He was under the direct supervision of Mr. Jenkins at all times. Rule XX contains no exclusion barring student practitioners from making appearances on

behalf of defendants charged with capital offenses. Further, under the umbrella of Rule XXXI, by order dated February 1, 1995, the Louisiana Supreme Court authorized the promulgation and implementation of standards relating to counsel appointed to represent indigents accused of capital crimes. Chapter 7 of the Louisiana Standards on Indigent Defense provides in pertinent part that trial lead counsel have five years experience and trial associate counsel have three years experience. Consistent with Rule XX, nothing in the standards set forth in Chapter 7 bars the Rule XX participation of student practitioners in capital cases.[7] Rule XXXI was repealed in December 1997 and a new rule reenacted effective January 1, 1998. Rule XXXI(A)(1) now provides that an indigent defendant in a capital case shall have appointed to represent him "no less than two attorneys ..., lead counsel ... and ... associate counsel ...." But, again, nothing in the new Rule XXXI bars Rule XX student practitioners from participating in capital cases.[8]

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Chapter 1 further provides that the indigent defense rules are not intended to confer upon an indigent defendant substantive rights beyond those recognized by the federal and state constitutions, and enactments of the legislature, nor intended to be used to determine the validity of a conviction. See State v. Gradley, 97-0641 (La.5/19/98), 745 So.2d 1160.

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New Rule XXXI(B) provides that the rule is not intended to

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La.C.Cr.P. art. 512 does not exclude student practitioners from making appearances on behalf of defendants charged with capital offenses. Perez implies that art 512 does because the statute only refers to assignment of "counsel" admitted to the bar for at least five years, and to assignment of an "attorney" with less experience as assistant counsel. Accepting this interpretation of La.C.Cr.P. art. 512 is analogous to reading La.C.Cr.P. art. 513, providing for assignment of counsel in non-capital cases, also as excluding participation of student practitioners because it refers to assignment of "counsel." There is no merit to this interpretation of La.C.Cr.P. art. 512.

In State v. Brooks, 94-2438 (La.12/19/94), 647 So.2d 339, rehearing granted on other grounds, 94-2438 (La. 3/24/95), 651 so.2d 300, the defendant was convicted of first degree murder and sentenced to death. The trial court subsequently vacated defendant's death sentence because the penalty phase of the trial had been conducted by an assistant to the lead counsel. The assistant attorney had been practicing law for less than five years. In a per curiam decision, the court reversed the trial court on the ground that the defendant had been represented

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form a basis for a procedural or substantive attack in any case, nor confer any substantive or procedural rights in favor of any accused beyond rights already recognized by the federal or state constitutions, or the laws or jurisprudence of this state.

by lead counsel who met the experience requirements of La.C.Cr.P. art. 512. Thus, La.C.Cr.P. art. 512 is intended to ensure that a defendant in a capital case is represented by counsel with at least five years experience. As in Brooks, defendant in the instant case was represented by counsel with at least five years experience.

Moreover, Perez has cited no prejudice to him as a result of Mr. Michaelson participating in his trial. He points to no deficiency in Mr. Michaelson's performance, and the record reflects none. To the contrary, the record reflects that Mr. Michaelson's performance was exemplary. Finally, Perez was not sentenced to death. The sentence imposed on defendant for his first degree murder conviction, life imprisonment at hard labor without benefit of parole, probation or suspension of sentence, is the same sentence he would have received had he been tried for and convicted of second degree murder, a non-capital offense. As a practical matter, he is in the same position he would be in had he been charged with, tried for, and convicted of second degree murder.

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 2

By this assignment of error, Perez argues that the trial court erred in allowing the State to introduce evidence of other crimes committed by

him, specifically, the testimony of Fair Grounds security officer Byron Polite concerning the earlier encounter between himself and Perez on the day of the murder.

State to introduce evidence of other crimes committed by him, specifically, the testimony of Fair Grounds security officer Byron Polite concerning the earlier encounter between himself and Perez on the day of the murder.

This assignment of error is grounded in the rule that evidence of other crimes committed by a defendant is generally inadmissible because of the risk of prejudice from evidence concerning unrelated acts of misconduct. State v. Prieur, 277 So.2d 126, 128 (La.1973); State v. Evans, 99-0211, p. 5 (La.App. 4 Cir. 6/2/99), 737 So.2d 921, 922.

In the instant case, the State filed a Prieur notice, informing Perez of its intent to present the testimony of Officer Polite. On March 7, 1997, at a motion hearing, the State announced it was ready to go forward on the second part of its Prieur motion, and the following colloquy was had:

BY MR. SALINO [for the State]:

The second part of the Prieur motion involves a confrontation Mr. Perez had earlier in the day, the same day of this incident, at another location near the Fairgrounds involving the Fairgrounds security

officer. That officer is also here to testify. And we'll present that and the Court can rule on whether or not that comes in.

BY THE COURT:

Mr. Jenkins?

BY MR. JENKINS:

Judge, as to that particular incident, we have no objection to that. But we'd like to get the officer's testimony-I think he was a security guard-as to the events that took place.

BY THE COURT:

Without objection, we'll allow it.

Fair Grounds security officer Byron Polite testified at the hearing. The trial court then ruled on both prongs of the State's Prieur motion. The following colloquy transpired:

BY THE COURT:

I mean at trial if you all call Lieutenant Polite, I'm going to allow him to testify. But you know, had the defendant objected on the record prior to his coming here on this 10 a.m. thing, I wouldn't have allowed it. But you didn't object to it, so I allowed it in.

BY MR. JENKINS:

It goes to our defense, Your Honor, so we don't object.

BY THE COURT:

Well, I figured that maybe you're trying to get some discovery on some things that might be useful to you, but under ordinary circumstances, had you objected, I would not have allowed that. But I will now.

BY MR. JENKINS:

That's fine, Your Honor.

BY MR. JENKINS [SIC]:

So, Judge, my understanding is that we will be allowed to call Officer Polite if we choose?

BY THE COURT:

Absolutely.

BY MR. SALINO:

Thank you, Judge.

Security officer Polite testified at trial without objection by Perez. Because he failed to object to the

testimony of security officer Polite and, in fact, concurred with the State's intention to call the witness to testify about his encounter with Perez, he is precluded from raising this issue as an assignment of error. See La.C.Cr.P. art. 841.

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 3

By this assignment of error, Perez argues that the evidence was insufficient to find that he was able to distinguish between right and wrong at the time of the offense.

The Louisiana Supreme Court was faced with the issue of insanity at the time of the offense in State v. Silman, 95-0154 (La.11/27/95), 663 So.2d 27, and set forth the applicable law as follows:

In Louisiana, a legal presumption exists that a defendant is sane at the time of the offenses. La.R.S. 15:432. To rebut the presumption of sanity and avoid criminal responsibility, defendant has the burden of proving the affirmative defense of insanity by a preponderance of the evidence. La.C.Cr.P. art. 652. Criminal responsibility is not negated by the mere existence of a mental disease or defect. To be exempted of criminal responsibility, defendant must show he suffered a mental disease or mental defect which prevented him from distinguishing between

right and wrong with reference to the conduct in question. La.R.S. 14:14; State v. Williams, 346 So.2d 181 (La.1977). The determination of sanity is a factual matter. All the evidence, including expert and lay testimony, along with the defendant's conduct and action, should be reserved for the fact finder to establish whether the defendant has proven by a preponderance of the evidence that he was insane at the time of the offense. State v. Bibb, 626 So.2d 913 (La.App. 5th Cir.1993), writ denied, 93-3127 (La.9/16/94); 642 So.2d 188; State v. Claibon, 395 So.2d 770 (La.1981). Lay testimony pertaining to defendant's actions, both before and after the crime, may provide the fact finder with a rational basis for rejecting unanimous medical opinion that the defendant was legally insane at the time of the offense. State v. Peters, supra; State v. Claibon, supra.

In reviewing a claim for insufficiency of evidence in an action where an affirmative defense of insanity is raised, this court, applying the standard set forth in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), must determine whether under the facts and circumstances of the case, any rational fact finder, viewing the evidence most favorable to the prosecution, could conclude, beyond a reasonable doubt, that the defendant failed to prove by a preponderance of the evidence that he was insane at the time of the offense. State v. Peters, 94-0283 (La.10/17/94); 643 So.2d 1222; State v. Nealy, 450

So.2d 634 (La.1984); State v. Price, 403 So.2d 660 (La.1981); State v. Claibon, supra ; State v. Roy, 395 So.2d 664 (La.1981).

95-0154 at p. 7, 663 So.2d at 32.

In the instant case, all five of the psychiatrists and the one psychologist who examined Perez for insanity at the time of the offense, all of whom testified for Perez, stated that he did not know the difference between right and wrong at the time of the offense.

However, two of those psychiatrists, Drs. Salcedo and Deland, initially diagnosed him on October 8, 1996, less than three months after the crime, as competent to proceed, finding him to be a malingerer because he kept answering that he did not remember when questioned about simple things, such as his date of birth. Dr. Salcedo said Perez had no mental disorder or defect which would render him incompetent to proceed. Dr. Deland wrote the court on February 24, 1997 to state that she and Dr. Salcedo had examined Perez a second time on January 30, 1997, after which she found that he had no symptoms of any mental illness which would affect his competency to proceed. Both doctors later changed their minds. Dr. Salcedo was contacted by defense attorneys who mentioned that Perez was acting oddly. Consequently, Dr. Salcedo said he examined Perez a second time, on May 6, 1997–almost ten months after the crime-at which time

Perez was verbalizing and had classic symptoms of psychosis.[9] Dr. Salcedo recommended that Perez be committed to the FFF at that time. Nevertheless, in his report from that May 1997 examination Dr. Salcedo still wrote that Perez "presented as previously; i.e., as an individual who is at the very least grossly exaggerating any psychopathology which might actually be present." Dr. Salcedo testified at trial, however, that he did not believe Perez had been malingering. Dr. Deland also examined Perez a second time, presumably on May 2, 1997, the date of her second report. She changed her mind because, by that second examination, after spending ten months in parish prison, Perez exhibited signs of psychosis.

Both Drs. Salcedo and Deland believed that Perez did not know right from wrong based on what they learned from him, his wife and son.

Dr. Ritter stated that he only examined Perez on one occasion, December 18, 1997–exactly one year and five months after the crime–to determine whether he was competent to proceed. Just as Drs. Salcedo and Deland had found on October 6, 1996 (and, apparently, January 30, 1997), Dr. Ritter

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There was no explanation why Dr. Salcedo did not mention the January 30, 1998 examination by he and Dr. Deland, which would have been his second examination, making Dr. Salcedo's May 1997 examination his third examination.

found on December 18, 1997 that Perez was competent to proceed, stating that he believed Perez was in a remission on that date. However, on February 3, 1998, Drs. Ritter and Salcedo wrote the court a letter, stating that they had examined Perez for both competency to proceed and sanity at the time of the offense, and both found that, although he was competent to proceed, he did not know right from wrong at the time of the offense. Not coincidentally, February 3, 1998 was the date Dr. Ritter, and presumably Dr. Salcedo also, met with Perez's wife and son. Dr. Ritter found that Perez did not know right from wrong based on what he also learned from Perez, his wife and son.

Dr. Jose Pena interviewed Perez in December 1997 to determine his competency to proceed, and interviewed him again on March 8, 1998, days before trial, for the specific question of Perez's mental state at the time of offense. Dr. Pena also interviewed Perez's wife and son via telephone on March 8, 1998. He also reached his conclusion that Perez did not know right from wrong at the time of the offense based on information given to him by Perez, his wife and son.

Dr. Guillermo Urrutia examined Perez in April 1997, nine months after the crime. In his detailed report Dr. Urrutia recounts the supposedly delusional beliefs of Perez, as told to him by Perez. Dr. Urrutia also interviewed Perez's wife and son,

and also concluded that Perez could not tell the difference between right and wrong.

Dr. Carlos Kromberger, the only psychologist to testify, examined Perez in April 1997. He found that Perez suffered from a severe persecutory delusional disorder, and that Perez did not have any idea what was going on when he shot the police officer, or knew the difference between right and wrong.

Dr. Carrington, a psychiatrist at the Feliciana Forensic Facility when Perez was sent there on August 9, 1997, did not examine Perez until that date, over one year after the crime. He gave no opinion as to whether or not Perez was capable of distinguishing right from wrong at the time he shot and killed Officer McCormick. However, he found Perez's thinking to be quite disorganized, consistent with a serious mental illness, and said Perez had hallucinations-he heard music and machinery. Perez's disorganized thinking and hallucinations completely disappeared after four weeks on anti-psychotic medication. Dr. Carrington did not believe Perez was malingering, a problem of which he said he was acutely aware. But he admitted that Perez's thirteen months of incarceration before being moved to the FFF could have contributed to the condition Perez was in upon arrival.

Mrs. Perez's prior statements were inconsistent. She told Dr. Kromberger in April 1997

that her husband had not been acting strangely before the crime, and that defendant had always had memory problems. However, she testified at trial that she also told him that her husband's behavior had been different during this period before the crime. When asked by Det. Catalanotto in July 1996 whether her husband had any psychological problems, she answered not that she remembered. While she testified at trial that before leaving Texas her husband had begun talking in a low whisper, so no one would hear him, she did not report this fact to Dr. Kromberger when she first talked to him, but only within two to three months of trial.

All of the physicians who testified that Perez did not know right from wrong based their opinions, in significant part, on information obtained from Perez's wife and son concerning his behavior prior to the shooting of Officer McCormick.

It is undisputed that Perez's fears stemmed from his belief that persons involved in the drug trade were pursuing him and posed a threat to him and his son. However, his son testified that Perez and his wife both believed that friends of Perez's step-grandfather were involved in drug activity. Perez's son further testified that he believed that his father had spurned a request by these persons to become involved in their drug activities. His son testified both parents believed that Perez had thereby made the "drug buyers" mad, and that Perez consequently believed these people were after him.

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This is a rational explanation for Perez's paranoid behavior-he was fearful because he had spurned drug dealers and they were after him. His fear for his and his son's safety may well have been justified. As for any possible belief by Perez that his wife may have been involved, there is no evidence that he could not have temporarily had a justifiable suspicion of his wife.

The medical experts all inferred that Perez's fears were delusional and not based in reality, as illustrated by Dr. Pena when he testified: "[W]hat we have here is a picture in which the symptoms began what appears to be one or two weeks before the incident at a time when there was no reason for the person to begin to act disturbed before anything happened." These assumptions that Perez's fears were not based in reality unquestionably formed the basis for the opinions of the medical experts that Perez did not know the difference between right and wrong at the time he shot Officer McCormick. Where those fears were based in reality, as the record indicates they may well have been, then the opinions of those physicians is called into question. Perez's possible very real fears essentially explain his supposed delusional thinking and paranoid behavior.

All of Perez's actions traveling to New Orleans were consistent with a man fleeing rebuffed drug dealers. He traveled back roads. He hurriedly left a convenience store, perhaps thinking anyone pursuing would catch up with he and his son. When

he arrived in New Orleans, he decided to get another vehicle. He parked his van and found his way to the Fair Grounds. He and his son were caught trespassing on Fair Grounds property by a security officer. He took a gun out of his pocket, held it at his side, and succeeded in frightening off the officer. Later, separated from his son, he took refuge in Ms. Mastio's utility shed. He was now on the run from not just any drug dealers he may have crossed, but law enforcement authorities as well. When Officer McCormick came upon him, he shot him because he did not want to go to jail–Dr. Pena testified that he could imagine the scenario that Perez simply shot Officer McCormick because he did not want to go to jail.

It is true that, in addition to the supposed delusional thinking, the medical experts found disorganized thinking in Perez, which was consistent with some type of psychosis or serious mental illness. This finding too factored heavily in the experts' opinions that Perez did not know right from wrong at the time of the offense. However, all of the findings of disorganized thinking were made following examinations conducted long after–at least nine months–the shooting of Officer McCormick. Charity Hospital records from the night of the shooting note Perez as being oriented, responsive, and obeying commands. Dr. Carrington admitted that Perez's condition at the time he first examined him at the FFF in August 1997 could have been attributed in some part to his thirteen months of

incarceration in Orleans Parish Prison. Two of the physicians, Drs. Ritter and Pena, did not even examine Perez until he had been taking anti-psychotic medication and was no longer experiencing either the supposed delusions or any disorganized thinking. This delay from the time of the offense to noting the disorganized thinking undermines the credibility of the medical experts insofar as their opinions that Perez was insane at the time offense.

On another point, it is important to note that, while anti-psychotic medication first prescribed to Perez at the FFF apparently remedied the disorganized thinking, allowing him to proceed to trial, there was no testimony by any of the medical experts that the now competent Perez and his wife no longer believed that friends of Perez's step-father had been involved with drugs; that defendant had spurned offers by these persons to become involved in the drug trade; or that he had consequently been afraid of harm to him and his son. These factors had been the basis of Perez's fears. These first two factors were facts as stated by Perez's wife and son, not delusions, and the resulting fear on the part of Perez may very well have been justified.

Also, Dr. Ritter stated that Perez's son said that while driving on the highway his father was pressing buttons in the van, thinking that for some "magical reason" this would throw off his pursuers. The son said his father told him he did that in hopes

that anyone pursuing him would think he was doing something. Perez was obviously attempting to outwit any pursuers, perhaps making them think that he saw them, by pushing buttons the son said were in an upper console, near the rear view mirror. Perez did not think he would throw off his pursuers for some "magical reason," as stated by Dr. Ritter. Yet, Dr. Ritter based his opinion that Perez was incapable of distinguishing right from wrong, in part, on this nonexistent "magical reason" action by Perez. This undermines Dr. Ritter's credibility. The jury could have considered the opinions of Drs. Deland and Salcedo as undermined because they found Perez free from any mental disease or defect after examining him less than three months after the crime; ten months after the crime found him incompetent to proceed; and then, within a month or so of trial, determined that he had been insane at the time of the offense and unable to distinguish right from wrong.

In conclusion, even assuming Perez was not malingering, the opinions of the medical experts are undermined by their obvious belief that he was suffering from delusions of persecution–crucial to their determinations that he did know the difference between right and wrong at the time of the offense–when the record supports the view that he may very well have been justified in his fears. Their opinions are also undermined by the fact that all of their observations of disorganized thinking in Perez, also crucial to their opinions and diagnoses, were

made long after the shooting of Officer McCormick, during which time his condition could have worsened. The opinions of Drs. Ritter, Deland and Salcedo could be viewed as also undermined for the aforementioned reasons.

When reviewing evidence for sufficiency, a reviewing court is not called upon to decide whether it believes the witnesses. State v. Rosiere, 488 So.2d 965, 968 (La.1986); State v. Smith, 600 So.2d 1319, 1324 (La.1992). The determination of credibility is a question of fact within the sound discretion of the trier of fact, and that determination will not be disturbed unless clearly contrary to the evidence. State v. Vessell, 450 So.2d 938, 943 (La.1984); State v. Campbell, 97-0358, p. 11 (La.App. 4 Cir. 5/20/98), 715 So.2d 488, 494, writ denied, 98-2485 (La. 2/12/99), 738 So.2d 564.

Considering the facts and circumstances of the instant case, it cannot be said that it would have been clearly contrary to the evidence for the jury to reject the credibility of the medical experts insofar as those experts stated that Perez was incapable of distinguishing right from wrong at the time he shot Officer McCormick. Thus, viewing all of the evidence in a light most favorable to the prosecution, any rational trier of fact could have found that Perez failed to prove by a preponderance of the evidence that he was incapable of distinguishing between right and wrong at the time he shot Officer McCormick.

Appendix C

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 4

By this assignment of error, Perez contends the trial court erred in instructing the jury on the definition of a necessary element of first degree murder.

After retiring to deliberate, the jury came back with a question regarding whether the offender had to know that he was shooting a police officer. The trial court read the definition of first degree murder, requiring specific intent to kill a peace officer, and told the jury that the statute required that they find that Perez had the specific intent to kill a peace officer. The court told the jury that the statute said nothing about the offender knowing that his victim was a peace officer, and then told the jury that they could "go either way on that." Perez claims the trial court erred in failing to provide the jury with a correct instruction on this alleged necessary element.

A defendant may not assign as error the giving or failure to give a jury charge or any portion thereof unless an objection thereto is made before the jury retires or within such time as the court may reasonably cure the alleged error. La.C.Cr.P. art. 801; State v. Hunter, 92-2535, p. 7 (La.App. 4 Cir. 4/13/95), 654 So.2d 781, 785, writ denied, 95-1217 (La.10/6/95), 661 So.2d 464. A defendant cannot

avail himself of an alleged error unless he made a contemporaneous objection at the time of the error. La.C.Cr.P. art. 841(A); State v. Seals, 95-0305, p. 5 (La.11/25/96), 684 So.2d 368, 373, cert. denied, Seals v. Louisiana, 520 U.S. 1199, 117 S.Ct. 1558, 137 L.Ed.2d 705 (1997); State v. Buffington, 97-2423, p. 9 (La.App. 4 Cir. 2/17/99), 731 So.2d 340, 346.

Perez submits the failure to object should not preclude review because the incorrect jury instruction concerning the definition of the crime raises constitutional issues. However, in State v. LeBlanc, 97-1388 (La.App. 4 Cir. 9/23/98), 719 So.2d 592, this Court refused to consider the defendant's claim that the trial court erred in giving a specific intent instruction to the jury regarding attempted second degree murder although the court went on to note that the error was harmless. More recently, in State v. Davis, 97-1827 (La.App. 4 Cir. 3/10/99), 732 So.2d 79, this Court held that the failure to object to an erroneous reasonable doubt instruction precluded appellate review of the alleged error.

We decline to address this assignment of error because Perez failed to object and preserve the issue for appellate review.

ASSIGNMENT OF ERROR NO. 5

By this assignment of error, Perez claims the evidence was insufficient to convict him of first degree murder.

Appendix C

This court set out the standard for reviewing convictions for sufficiency of the evidence in State v. Nogess, 98-0670 (La.App. 4 Cir. 3/3/99), 729 So.2d 132, as follows:

In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of act could have found the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 588 So.2d 757 (La.App. 4 Cir.1991). However, the reviewing court may not disregard this duty simply because the record contains evidence that tends to support each fact necessary to constitute the crime. State v. Mussall, 523 So.2d 1305 (La.1988). The reviewing court must consider the record as a whole since that is what a rational trier of fact would do. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted. The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. Mussall; Green; supra. "[A] reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence." State v. Smith, 600 So.2d 1319 (La.1992) at 1324.

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In addition, when circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. State v. Shapiro, 431 So.2d 372 (La.1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. This is not a separate test from Jackson v. Virginia, supra, but rather an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. State v. Wright, 445 So.2d 1198 (La.1984). All evidence, direct and circumstantial, must meet the Jackson reasonable doubt standard. State v. Jacobs, 504 So.2d 817 (La.1987).

98-0670, pp. 8-9, 729 So.2d at 136-137.

To convict Perez the State had to prove beyond a reasonable doubt that he killed Officer Chris McCormick while having the specific intent to kill or inflict great bodily harm upon a peace officer who was engaged in the lawful performance of his duties. La. R.S. 14:30(A)(2). Specific intent need not be proven as a fact, but may be inferred from the circumstances of the transaction and the actions of the defendant. State v. Maxie, 93-2158, p. 11 (La. 4/10/95), 653 So.2d 526, 532; State v. Sciortino,98-2418, p. 5 (La.App. 4 Cir. 11/25/98), 724 So.2d 258, 261.

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Perez admitted firing the shot that killed Officer Chris McCormick. The bullet struck Officer McCormick at nipple level, just to the left of the midline of his chest, and penetrated his heart and left lung, coming to rest under his shoulder blade. It can be inferred from these circumstances that when Perez fired that shot to Officer McCormick's chest he intended to kill or inflict great bodily harm upon him.

It will be assumed for the sake of argument that to convict Perez of first degree murder of a peace officer, the jury had to find beyond reasonable doubt that he knew he was shooting a peace officer engaged in the lawful performance of his duties. The shooting occurred at approximately 11:40 p.m. Officer McCormick was shot at the bottom of the rear stairs leading from Debbie Mastio's apartment into the back yard. Debbie Mastio testified that there was an outdoor light on the upper left side of her second-floor rear door, as one exits the door. This would have been at the top of the stairs. She stated that it was only "dimly lit" underneath the stairs where the hot water heater was located, inside of a utility shed. When Ms. Mastio went out to check on her water heater, she leaned over he stairs and used a flashlight to shine down underneath the stairs, toward her utility room. So did Dr. Black, when he went out to check on the person she had seen. However, Officer McCormick was shot at the bottom of the stairs, a position in which he must have been illuminated to some degree by the back porch light.

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Dr. Black said Officer McCormick was shot just as he turned at the bottom of the stairs-just as he turned toward defendant. The fatal bullet was recovered underneath the skin of Officer McCormick's back, below his shoulder blade. The autopsy protocol shows the location of the entrance wound and the location of the bullet when it stopped, evidencing that the bullet traveled at a slight angle after entering the chest at the nipple level, slightly to the left of the midline of the chest. Thus, Officer McCormick, in full uniform, was almost directly facing defendant when defendant shot him. A single spent .25 caliber cartridge casing was recovered from the utility shed. With defendant located in or very near the utility shed, underneath the stairs, he would have been in the dark. Officer McCormick, again, right near the bottom of the stairs, which led straight down to the yard, would have been bathed in some light from the back porch light.

In addition to numerous photographs of the homicide scene being introduced at trial, the jury visited the scene of the homicide. While the record does not reflect precisely at what time the visit to the scene occurred, it occurred after the court's dinner break on March 12, 1996. The court can take judicial cognizance of the fact that daylight savings time does not begin until April. Thus, it can be concluded that the jury viewed the scene during darkness. Also, the State represents that the jury saw the scene as it was on the night of the homicide.

Perez was hiding on the night of the shooting. He knew he had brandished a gun at a security officer earlier in the day, and at Ms. Mastio and Dr. Black in Ms. Mastio's backyard. Notably, he had not fired at either Ms. Mastio or Dr. Black. However, he chose to fire at Officer McCormick, a police officer in full uniform. It could have been inferred by the jury that he fired at Officer McCormick, but not Ms. Mastio or Dr. Black, precisely because Officer McCormick was a police officer and he did not want to go to jail.

Considering all of this evidence in a light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt that Perez killed Officer McCormick with the specific intent to kill or inflict great bodily harm upon him, knowing that he was a peace officer engaged in the lawful performance of his duties.

Although the grand jury indictment also charged Perez with first degree murder on the ground that he intended to kill or inflict great bodily harm on more than one person, the record does not support a conviction on that ground. The State does not even address that aspect of defendant's sufficiency claim.

This assignment of error has no merit.

DECREE

Appendix C

For the foregoing reasons, Perez's conviction and sentence are affirmed.

AFFIRMED.